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1363

United States

1363

# Circuit Court of Appeals

For the Ninth Circuit.

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ELOESSER-HEYNE MANN COMPANY, a Corporation,

Appellant,

vs.

KUH BROS., a Corporation,

Appellee.

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## Transcript of Record.

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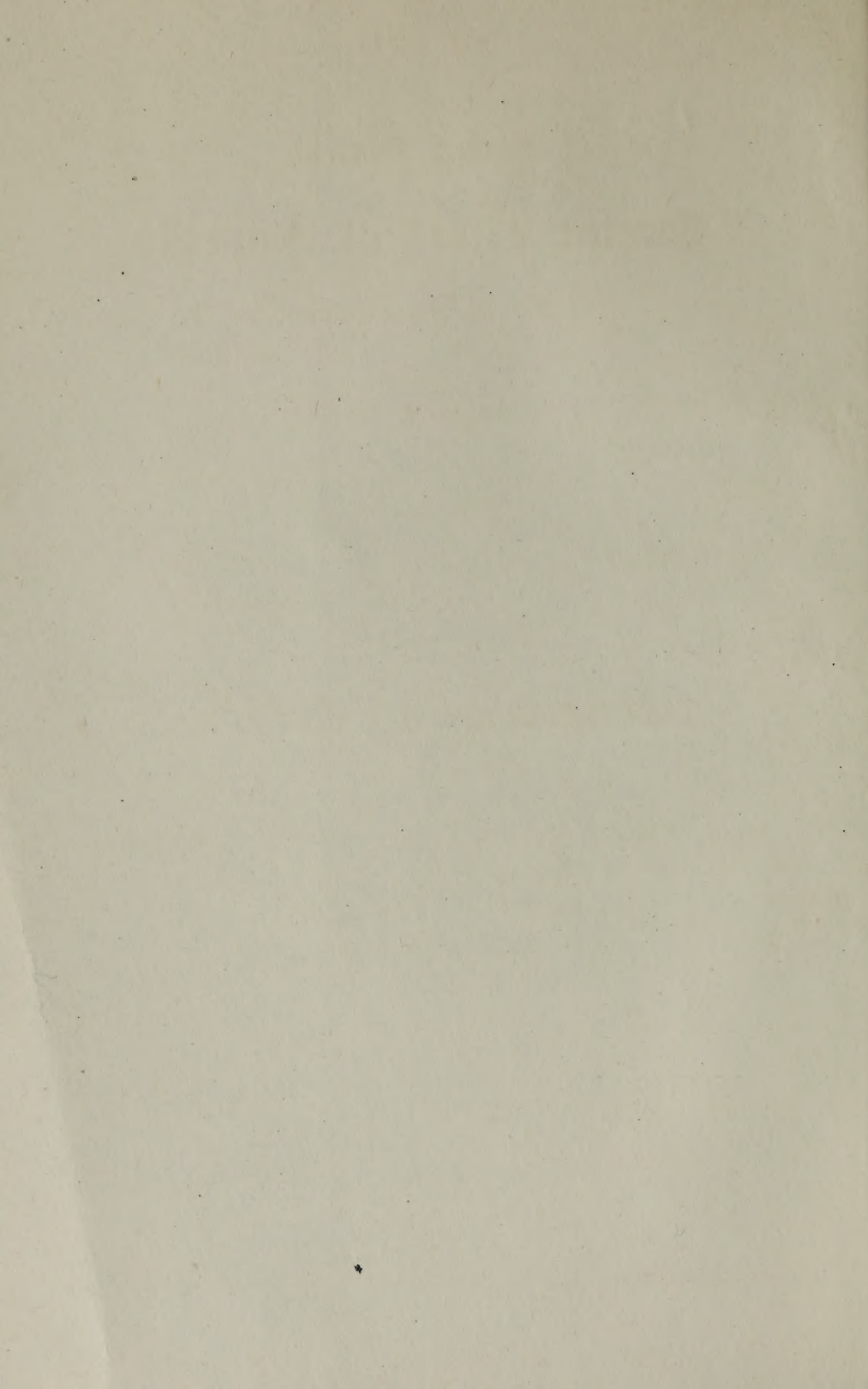
Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.

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FILED

OCT 8 - 1923

F. D. MONCKTON,  
CLERK





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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ELOESSER-HEYNEMANN COMPANY, a Corporation,

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vs.

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**Transcript of Record.**

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## **Names and Addresses of Attorneys of Record.**

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Attorney for Appellant.

JOHN H. MILLER, Esq.,

Crocker Bldg., San Francisco, California.

Attorney for Appellee.

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In the Southern Division of the United States  
District Court, for the Northern District of  
California, Second Division.

IN EQUITY—No. 615.

ELOESSER HEYNEMANN CO., a Corporation,  
Plaintiff,

vs.

KUH BROTHERS, a Corporation,  
Defendant.

### **Bill of Complaint.**

Eloesser Heynemann Co., a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the city and county of San Francisco, State of California, a citizen of said State, and a resident and inhabitant of the Northern District thereof, as plaintiff, brings this, its bill of complaint against Kuh Brothers, a corporation duly organized and existing under and by virtue of the laws of the State of California, a citizen of said

State, and a resident of and having a regular and established place of business in the city and county of San Francisco, State of California, within the Northern District of California, within which district the acts of infringement hereinafter mentioned are charged to have been committed, as defendant, and the plaintiff complains and says:

I.

The grounds upon which the jurisdiction of the Court depends is that this is a suit arising under the patent laws of the United States.

II.

That heretofore, to wit, on and prior to the seventh day of May, 1919, Julius Miller and David Macowsky, citizens of the United States, residents of the city and county of San Francisco, State of California, were the original, first, and joint inventors of a new, useful, and ornamental design for child's rompers; that on the seventh day of May, 1919, they jointly made due and [1\*] proper application to the United States Patent Office for the issuance unto them jointly of design letters patent of the United States for the term of fourteen years for the said design invention; that after the requisite legal proceedings taken in connection with the said filed application, there was issued, granted and secured unto them jointly, their heirs, assigns, and legal representatives, in accordance with and under the laws of the United States thereto pertaining design letters patent of the United States No. 56,450 for the full term of fourteen years, from and after the

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\*Page-number appearing at foot of page of original certified Transcript of Record.

26th day of October, 1920, which said design letters patent are still in full force and effect; that a more particular description of the said invention patented in and by said letters patent will more fully appear from the said letters patent themselves, a certified copy of which is ready in Court to be produced, and profert is hereby made thereof.

### III.

That on the 8th day of March, 1921, the said Julius Miller and David Macowsky, duly and regularly by an instrument in writing duly recorded in the United States Patent Office transferred unto the plaintiff herein, its successors and assigns, all right, title and interest in and to the said Design invention and the Design Letters Patent No. 56,450 granted therefor on the 26th day of October, 1920, for the full remaining unexpired term thereof, together with all claims and demands both at law and in equity which they the said Julius Miller and David Macowsky had or held for past infringement thereof, as fully and entirely as the same would have been held and enjoyed by them, their heirs, assigns and legal representatives, together with the right to institute suit at law or in equity for the recovery of damages and profits for such past infringement of the said letters patent, as by said assignment or duly authenticated copy thereof, all of which will more fully and at large appear from a duly authenticated copy of said assignment, profert of which is hereby made.

### IV.

That the invention of the said design letters



patent is [2] of great value and has been extensively manufactured and sold by the plaintiffs herein, and that the public has generally acquiesced in the validity of the said design letters patent, and that in the exercise of the exclusive rights and privileges granted and conferred by the said design letters patent, the plaintiff herein has manufactured and is now manufacturing child's rompers covered by the said design letters patent, and that it has manufactured and sold a large number of child's rompers embodying and containing therein the said design invention of the said design letters patent, and that upon each and every of said child's rompers so manufactured and sold, as aforesaid, the plaintiff has marked, or caused to be marked thereon the words "Patented," together with the date and year said design letters patent were granted, and, as hereinafter set forth, plaintiffs would now enjoy the exclusive right, liberty and privilege of making, using and vending to others to be used child's rompers embodying said patented design, which said right, liberty and privilege has been of great and incalculable benefit and advantage to plaintiff herein, and would continue to be of such value and benefit but for the unlawful and infringing acts of defendant herein specified.

#### V.

That since the grant, issuance and delivery of the letters patent aforesaid No. 56,450, and prior to the bringing of this suit, and within six years last past, in the Northern District of California and elsewhere, and against the will of plaintiff herein, the defend-

ant herein has made, used and sold, and caused to be made, used and sold, child's rompers embodying the patent design invention aforesaid in infringement of the said Design Letters Patent No. 56,450, and has manufactured and sold in large quantities child's rompers in imitation of child's rompers embodying said patented design; that defendant herein has been advised by the plaintiff herein of its rights, and has been requested to desist from its unlawful and infringing acts aforesaid, but the said defendant herein has failed and refused, [3] and continues to refuse to desist from same, and continues and threatens to continue the manufacture, using and selling, and causing to be manufactured, used and sold, child's rompers embodying therein the design invention of said Letters Patent No. 56,450 and infringing the said letters patent, all to the great and irreparable injury of plaintiff herein, and for which the said plaintiff has no plain, speedy, nor adequate remedy at law; that by reason of the infringing act aforesaid the defendant herein has realized and is realizing great benefits and profits which rightfully belong to the plaintiff herein; that the said plaintiff has suffered, and is now suffering great and irreparable injury and damage by virtue of said infringing acts aforesaid, but the amount of said profits and damages is unknown to the plaintiff herein and can be ascertained only by an accounting.

## VI.

That the plaintiff herein is a large manufacturer, and in the exercise of the rights and privileges conferred upon it by said letters patent, and in the en-

joyment of the same, has hitherto preserved and still desires and endeavors to preserve unto itself exclusively the manufacture and sale of child's rompers containing and embodying the said patented design invention, throughout the territory covered by the said letters patent now owned and controlled by the said plaintiff; and has been and still is desirous of preserving unto itself the exclusive right, belonging to it under said letters patent, of conferring the right to manufacture, use and sell said patented design invention upon those alone who purchase the same from the plaintiff herein; and the plaintiff is well fitted for such manufacture and sale, and is capable of supplying the entire market, and has, ever since acquiring the said design letters patent, supplied and filled all demands and orders made upon it for child's rompers embodying the said design invention, and that it has never acquiesced in any invasion or infringement of its rights under said design letters patent.

And for as much as plaintiff herein has no plain, speedy, [4] or adequate remedy in the ordinary Courts of Law, and cannot have adequate relief save in a Court of Equity where matters of this kind are properly cognizable and relievable.

WHEREFORE the plaintiff prays judgment and decree against defendant, as follows:

First. That upon final hearing the defendant herein, its officers, agents, servants, attorneys, workmen and employees, and each of them be enjoined and restrained from manufacturing, using and selling child's rompers manufactured under, and which



infringe upon, said United States Design Letters Patent No. 56,450, of October the 26th, 1920, and that a writ of injunction be issued out of, and under the seal of this Court, enjoining said defendant as aforesaid:

Second. That upon the filing of this bill of complaint, an injunction *pendente lite* be issued enjoining the defendant, its officers, and other representatives above mentioned, and each of them, until final hearing of this cause, from making, using or selling any child's rompers manufactured under and which infringe said Design Letters Patent No. 56,450 aforesaid.

Third: That the plaintiff have and recover from the defendant herein, the damages which it has sustained, and the profits realized by the defendant from and by reason of the infringement aforesaid, together with the costs of suit, and for such other and free relief as to this Court may seem proper and in accordance with equity and good conscience.

ELOESSER HEYNEMANN, CO.

By N. A. Acker,  
(Its Solicitor and Counsel.)

[Endorsed]: Filed May 17, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [5]

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(Title of Court and Cause.)

**Answer of Defendant to Plaintiff's Bill of Complaint.**

Now comes Kuh Brothers, a corporation, defendant in the above-entitled suit, and for answer

to the plaintiff's bill of complaint, denies, avers and alleges as follows:

1. Answering paragraph I of said bill, defendant admits the allegations thereof.

2. Answering paragraph II of said bill, defendant says that it is without knowledge as to whether or not on or prior to the 7th day of May, 1919, or any other time, Julius Miller and David Macowsky, citizens of the United States, or residents of the city and county of San Francisco, State of California, or of any other place, were the original, first and joint, or the original, first or joint inventors of the alleged new, useful and ornamental design for child's rompers referred to in paragraph II, or on the seventh day of May, 1919, or any other date, they jointly or otherwise made due or legal or any application to the United States Patent Office for the issuance to them jointly or otherwise of design letters patent of the United States for the term of fourteen (14) years or any other term for the said design invention, or that after the requisite or any legal proceedings taken in connection with said filed application there was issued, granted or secured upon them jointly or otherwise, their heirs, assigns and legal representatives, in accordance with or under the laws of the United States thereto pertaining or otherwise, design letters patent of the United States, No. 56,450, for the full term of fourteen (14) years or any other term from and after the 26th day of October, 1920, or any other date, or that said design letters patent are still in full force and effect, or that a more particular description of

said alleged invention claimed to be patented in and by said letters patent will more fully appear from the said letters patent themselves, [6] or that a certified copy thereof is ready in court to be produced.

3. Answering paragraph III of said bill, defendant says that it is without knowledge as to whether or not on the 8th day of March, 1921, or any other day, the said Julius Miller and David Macowsky duly or regularly or otherwise by an instrument in writing duly or otherwise recorded in the United States Patent Office, transferred unto the plaintiff herein, its successors or assigns, all or any right, title or interest in and to the said design invention, or the Design Letters Patent No. 56,450, alleged to have been granted therefor on the 26th day of October, 1920, for the full remaining unexpired term thereof or any other term, or together with all or any claims or demands either at law or in equity, which the said Julius Miller and David Macowsky had or held for past infringement thereof, as fully and entirely as the same would have been held and enjoyed by them, their heirs, assigns, or legal representatives, or otherwise, or together with the right to institute suits at law or in equity for the recovery of damages and profits for such past infringement of said letters patent, or that by said assignment or a duly authenticated copy thereof, all of which will more fully or at large appear.

4. Answering paragraph IV of said bill, defendant denies that the alleged invention of the said design letters patent is of great or any value or has



been extensively manufactured or sold by the plaintiff herein, or that the public has generally or at all acquiesced in the validity of the said design letters patent, or that in the exercise of the exclusive rights and privileges alleged to be granted and conferred by such design letters patent or otherwise or at all, plaintiff herein has manufactured or is now manufacturing child's rompers covered by the said design letters patent, or that it has manufactured or sold a large or any number of child's rompers embodying or containing therein said design invention of the said design letters patent, or that upon each and every or any of said child's rompers so alleged to be manufactured and sold as aforesaid, plaintiff has marked or caused to be marked thereon the word "Patented," together [7] with the day and year said design letters were granted, or that plaintiffs would now enjoy the exclusive right, liberty and privilege of making, using and vending to others to be used child's rompers embodying said patented design, or that said right, liberty and privilege has been of great or incalculable or any benefit or advantage to the plaintiff, or would continue to be of such value or benefit but for the alleged unlawful and infringing acts of defendant.

5. Answering paragraph V of said bill, defendant denies that since the grant, issuance or delivery of the letters patent aforesaid, No. 56,450, or prior to the bringing of this suit, or within six (6) years last past, or at any other time, in the Northern District of California, or elsewhere, or any other place, or against the will of the plaintiff, defendant

has made or used or sold or caused to be made, used or sold child's rompers, embodying the patented design invention aforesaid, infringement of the said Design Letters Patent No. 56,450, or has manufactured or sold in large or any quantities child's rompers in imitation of the child's rompers embodying said patented design, or that the defendant has been advised by the plaintiff of its said alleged rights, or has been requested to desist from its alleged unlawful and infringing acts, or that the defendant herein has failed and refused, or continues to refuse to desist therefrom, or continues or threatens to continue the manufacture, using and selling, and causing to be manufactured, used or sold, child's rompers embodying therein the design invention of said Letters Patent No. 56,450, or infringing the said letters patent, or that any acts or doings of this defendant were or are to the great or irreparable or any injury of the plaintiff, or that for the same plaintiff has no plain, speedy or adequate remedy at law, or that by reason of the alleged infringing acts aforesaid this defendant has realized or is realizing great or any benefits or profits which rightfully belong to the plaintiff herein, or any benefits or profits, or that the said plaintiff has suffered or is now suffering great or irreparable or any injury or damage by [8] virtue of the alleged infringing acts of defendant aforesaid.

6. Answering paragraph VI of said bill, defendant is without knowledge as to whether or not the plaintiff is a large manufacturer or in the exercise

of the rights or privileges conferred upon it by the said letters patent, or in the enjoyment of the same, has hitherto or still desires or endeavors to preserve unto itself exclusively the manufacture and sale of child's rompers containing and embodying the said patented design invention, throughout the territory covered by the said letters patent, now owned or controlled by the said plaintiff, or has been or still is desirous of preserving unto itself the exclusive right belonging to it under said letters patent, of conferring the right to manufacture, use and sell said patented design invention upon those alone who purchase the same from the plaintiff herein, or that the plaintiff is well fitted for such manufacture or sale, or is capable of supplying the entire market, or has ever since the acquiring of said design letters patent or at any time supplied or filled all demands or orders made upon it for child's rompers embodying the said design invention, or that it has never acquiesced in any invasion or infringement of its rights under said design letters patent.

## II.

And for a further and separate defense defendant avers that the letters patent in suit are void and of no effect in law for the reason that the faculty of invention was not required or exercised or used in producing the design described in said letters patent and sought to be patented by the claims thereof.

## III.

And for a separate and further defense defendant avers that Julius Miller and David Macowsky, the parties named as patentees in the patent in suit,



were not the original and joint inventors of the thing sought to be patented in and by the said patent, nor of any material or substantial part thereof, but prior to the supposed invention of the said thing sought to be patented, the same was shown, indicated, described and patented in [9] and by the following named United States letters patent, issued to the following named persons and in and by the following named printed publication, viz.:

### PRIOR PATENTS.

Name of Patentee	No. of Patent	Date of Patent.	Present Residence
Wm. I. Zidell	52,720 (Design)	Nov. 19, 1918	Los Angeles, Cal.
Wm. I. Zidell	54,809 (Design)	Mch. 23, 1920	Los Angeles, Cal.
Geo. Averill	47,447 (Design)	June 15, 1915	Los Angeles, Cal.
Simon E. Davis	51,674 (Design)	Jan. 8, 1918	San Francisco, Cal.
Mary T. Verde	1,255,491	Feb. 5, 1918	Boston, Mass.

### PRINTED PUBLICATIONS.

DUTCH TWINS, published in 1911, by Houghton-Mifflin Co., at Cambridge, Massachusetts; Author, Lucy Fitch Perkins, cover pages 1, 2, 5, 10, 15, 20, 31, 32, 40, 44, 53, 54, 136, 147, 187 and 191.

PICTORIAL REVIEW, published by The Pictorial Review Co., at 200 West 39th St., New York City, N. Y., issue of May, 1917.

GOOD DRESSING, published by Home Pattern Company, at 18 East 18th Street, New York City, N. Y., issue of February 1917, page 5.

GOOD DRESSING, published by Home Pattern Company, at 18 East 18th Street, New York City, N. Y., issue of April 1918, page 11.

VOGUE, published by The Vogue Company at 19 West 44th Street, New York City, issue of July 15, 1915, page 58.

VOGUE, published by The Vogue Company at 19 West 44th Street, New York City, N. Y., issue of September 15, 1915, page 77; issue of February 15, 1916, Romper No. 3257; issue of April 15, 1917, Romper No. 3787.

LADIES' HOME JOURNAL, published by the Curtis Publishing Co., at Philadelphia, Pa., issue of April 1916, page 116. [10]

MARKEN AND ITS PEOPLE, published by Moffatt, Yard & Co., at 116-120 West 32 Street, New York City, N. Y., author George Wharton Edwards, in 1912, page 18.

HOLLAND AND THE HOLLANDERS, published by Dodd, Mead and Company, at Fourth Avenue and 30th Street, New York City, N. Y., author David S. Meldrum, in 1898 and 1904, pages 16, 160 and 371.

THINGS SEEN IN HOLLAND, published by E. P. Dutton & Co., at 31 West 23d Street, New York City, N. Y., author Charles E. Roche in 1909, and 1911, page —.

THREE VAGABONDS IN FRIESLAND, with a Yacht and Camera, published by E. P. Dutton & Co., at 31 West 23d Street, New York City, N. Y., author H. F. Tomalin, in 1907, pages 42 and 43.

HOME LIFE IN HOLLAND, published by the MacMillan Co. at 66 Fifth Avenue, New York City, N. Y., author David S. Meldrum, in 1911, page 180.

- CATALOGUE, issued by Taber-Prang Art Co. at Springfield, Massachusetts, in 1907, at page 188.
- HOLLAND SKETCHES, published by Charles Scribner's Sons, at 153 Fifth Avenue, New York City, N. Y., author Edward Penifield in 1912, page 94.
- NATIONAL GEOGRAPHIC MAGAZINE, published by the National Geographic Society at Washington, D. C., issue of January, 1915, pages 26 and 28.
- THE ELITE STYLES, published by the Elite Pattern Co. at 26 Union Square, New York City, N. Y., issue of April, 1911, page 35.
- THE ELITE STYLES, published by the Elite Pattern Co. at 26 Union Square, New York City, N. Y., issue of September, 1916, page 48.
- LADIES' HOME JOURNAL, published by Curtis Publishing Co. at Philadelphia, Pa., issue of May, 1916, page 80.
- THE MODERN PRISCILLA, published by the Priscilla Publishing Company, at 85 Broad Street, Boston, Massachusetts, [11] issue of March, 1917, page 35.
- WOMAN'S HOME MAGAZINE, published by the New Idea Publishing Company, issue of May, 1917, page 55, at New York City, N. Y.
- CATALOGUE No. 83, published by Montgomery Ward & Co., at Chicago, Ill., for the year 1915, page 159.
- CATALOGUE No. 86, published by Montgomery Ward & Co., at Chicago, Ill., for the year 1916, page 152 and page 336.



CATALOGUE No. 67, published by Bellas, Hess & Co., at Washington, Morton and Barrow Streets, New York City, N. Y., issued in 1915, page 155.

CATALOGUE No. 90, published by Montgomery, Ward & Co., at Chicago, Ill., page 131.

#### IV.

And for a separate and further defense, defendant avers that Julius Miller and David Macowsky were not the original and first inventors of the thing sought to be patented in and by the letters patent in suit, but prior to the supposed invention thereof by the said Julius Miller and David Macowsky the said thing sought to be patented was known to and used by the following named persons having the following named residences at the following named places, to wit:

By William I. Zidell, at Los Angeles, California, and his residence is Los Angeles, California.

By George Averill, at Los Angeles, California, and his present address is Los Angeles, California.

By Mary T. Verde, at Boston, Massachusetts, and her present address is Boston, Massachusetts.

By Simon E. Davis, at San Francisco, California, and his present address is San Francisco, California.

By Levi Strauss & Company, a corporation created under the laws of the State of California, at San Francisco, California, and their present residence is San Francisco, California.

By Nathan Krauskopf, at New York City, State of New York, [12] and his present address is New York City, N. Y.

By Nathan Krauskopf Company, a corporation created under the laws of the State of New York, at the city of New York, State of New York, and its present residence is city of New York, N. Y.

WHEREFORE, this defendant prays that the plaintiff take nothing by this suit, and that the bill of complaint be dismissed with costs to defendant.

JOHN H. MILLER,

Attorney and Counsel for Defendant.

Service of the within answer admitted this 29th day of June, A. D. 1921.

N. A. ACKER,

Attorney for Plaintiff.

[Endorsed]: Filed Jun. 30, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [13]

---

(Title of Court and Cause.)

**Amendment to Answer.**

Now comes defendant, and by leave of Court first had and obtained, amends its answer in the above-entitled suit by adding thereto at the end of paragraph IV at line 27, page 9 of said answer the following, to wit:

“By H. Garfinkle at San Francisco, California, and his present residence is Oakland, California.

“By the California Art Works at San Francisco, California; discontinued business under said name.

“By E. J. Feisel at San Francisco, California, and his present address is San Francisco, California.

“By Louis Kuh at San Francisco, California, and his present residence is San Francisco, California.

“By Irwin D. Kuh at San Francisco, California, and his present residence is San Francisco, California.

“By Kuh Brothers, a corporation created under the laws of the State of California, at San Francisco, California, and its present address is San Francisco, California.

JOHN H. MILLER,

Solicitor and Counsel for Defendant.

Service of the within amendment to answer admitted this 26th day of May, A. D. 1922.

N. A. ACKER.

[Endorsed]: Filed Jun. 5, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

---

(Title of Court and Cause.)

**(Decision on Merits.)**

Plaintiff owns Design Patent No. 56450 applied for May 7, 1919, and alleges infringement. The defenses are no invention by the patentee, anticipation, and prior publication. The only patent specification is “child’s romper,” illustrated by views, front and rear. These picture a garment of a horizontal line from the end of one short sleeve across the shoulders to the end of the other, notched with a square Dutch neck, belt at the arm pits and which might or might not indicate a detachable character, peg top long trousers, likewise, two ornamental



patch pockets below the belt and buttons at back of waist and belt. As manufactured by plaintiff, waist and trousers are sewed together in front and belt sewed over the seams, the whole of proportions varying considerably from those of the patent.

Subsequent to the patent defendant manufactured an identical garment, but on notice modified it to round neck, yoke in front and back of waist, front belt of two pieces sewed at the sides and one button in front, cuff-like bands at ends of sleeves, braid along outlines of bands and yoke, and pockets not patch but characteristically feminine, viz., rather concealed and inaccessible inside the flapping top or shoulder of the peg. To overcome the presumption of validity of the patent, defendant by plea and evidence presents a variety of patents and garments that singly or combined disclose every feature of plaintiff's and of date more than two years prior to the latter's application.

As a matter of fact plaintiff's garment is none other than the Hollandese boy's costume from time immemorial, known everywhere from use in original or modified forms, from paintings, engravings illustrations and literature, to an extent warranting judicial notice. [15]

See *Office etc. Co. vs. Co.*, 174 U. S. 497;

*New York etc. Co. vs. Co.*, 137 U. S. 450.

If, however, the last cited case relating to a design not thus known be construed to forbid judicial notice as aforesaid, it is only necessary to advert to defendant's evidence thereof, viz., illustrations in Perkins' "*The Dutch Twins*," published not later

than 1915 by "The Riverside Press," and various garments and designs of date not later, especially Averill's Design Patent No. 47447.

The general principles of patent law applicable to designs are sufficiently set out in the following decisions of the Appellate Court of this Circuit, viz.:

Majestic etc. Co. vs. Co., 276 Fed. 682;

Faris vs. Co., 273 Fed. 900;

Zidell vs. Dexter, 262 Fed. 145.

It is apparent that the design in suit is for a garment in entirety and not for mere accessories, ornamentation or other incidentals.

It follows that the peculiar and distinctive appearance and impression assumed to be invented, patented and controlled are not those of mere pattern outlines or flat display or incidentals, but are those presented by the garment as a whole when draped upon the person of the wearer. Hence, two such garments thus draped that in this appearance and impression are substantially alike, are of like design however they may vary in pattern details of curvatures and angularities, or differ in accessories of belt, yoke, bands, buttons, braid and the like. At best, changes therein are resort to equivalents. Defendant's garment in entirety is plaintiff's in appearance and impression, but in view of the prior state of the art, in the latter is no invention and in the former is no infringement.

There is no doubt of the oddity, quaintness and simple artistic merit of plaintiff's design, nor of the utility (sometimes of account even in design

patents), attractiveness, [16] popularity, and wide use of its garment.

In both, however, there is none of the patentee's genius of invention or artistry, but only the trade instinct of the manufacturer and salesman. For between plaintiff's design and garment and those of the illustrations of "The Dutch Twins," there is no substantial difference.

In appearance and impression they are alike, are one design, of which either patented, the other would anticipate or infringe. It follows that by reason of this anticipation, publication and lack of invention, plaintiff's patent is invalid.

The suit thus disposed of, it is unnecessary to inquire whether, if plaintiff's patent was valid as for a new combination of old elements, defendant's garment would infringe, save to observe that in proper application of the rule of *Zidell vs. Dexter, supra*, it would not infringe.

Decree for defendant, with costs.

April 7, 1923.

BOURQUIN,  
J.

[Endorsed]: Filed April 7, 1923. Walter B. Maling, Clerk. [17]

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In the Southern Division of the United States  
District Court, in and for the Northern Dis-  
trict of California, Second Division.

Before Hon. GEORGE M. BOURQUIN, Judge.

No. 615—IN EQUITY.

ELOESSER HEYNEMANN COMPANY, a Cor-  
poration,

Plaintiff,

vs.

KUH BROS., a Corporation,

Defendant.



April 3, 1923.

Counsel Appearing:

For Plaintiff:

N. A. ACKER, Esq.

For Defendant:

JOHN H. MILLER, Esq.

Mr. ACKER.—If your Honor please, this is an action instituted by Eloesser-Heynemann Company, one of the largest manufacturers of garments, against Kuh Bros., for infringement of design letters patent of the United States, No. 56,450, granted under date of October 26, 1920, for what is known as a play suit for children, and more especially adapted for girls. We expect to prove in the present case that Kuh Bros. commenced the manufacture of what is known as play suits for girls, and had received notice of infringement from the owners of the Letters Patent, and the patentees thereof, and that on receiving notice Kuh Bros. thereupon called upon Eloesser-Heynemann Company and endeavored to solicit its aid in an endeavor to invalidate the letters patent. That Eloesser-Heynemann Company [19—1] took counsel as to whether or not the garment constituted an infringement of the design garment of the letters patent in suit, and being advised that it did constitute an infringement, took a license under the letters patent, and at a subsequent date acquired all right, title and interest in and to the letters patent. We propose to show that these garments were sold side by side in the open market, and are accepted by the

users of this class of garments as being one and the same article; in other words, there is no difference between the two, and that the sales, to a large extent, are directed to Kuh Bros. by reason of the fact that they undersell or sell at a lower price.

The action was commenced under Section 4929 of the Revised Statutes, as amended, which reads as follows:

“Any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, the same as in cases of inventions or discoveries covered by section 4886, obtain a patent therefore.”

You therefore notice that that section provides for an article of manufacture.

At this time we wish to offer in evidence the letters patent in suit. I have the original of the letters patent, which I will hand to your Honor and ask that it be marked plaintiff's [20—2] Exhibit 1.

(The document was marked Plaintiff's Exhibit 1.)

I also offer in evidence the assignment or the transfer of the letters patent to Eloesser-Heyne-mann Company, the same being duly acknowledged before a notary public. This assignment carries all right of action for past infringements in law and equity. I ask that the same be marked Plaintiff's Exhibit 2.

(The document was marked Plaintiff's Exhibit 2.)

The COURT.—It will be admitted.

Mr. MILLER.—Your Honor, I have not seen this document at all; it seems to refer to a patent for a child's romper. I understood they were suing on what is known as a play suit.

The COURT.—If you have any objection state it.

Mr. MILLER.—I will have to read it over to see what it is. It has never been submitted to me before.

The COURT.—You have not seen a copy of it.

Mr. MILLER.—No.

Mr. ACKER.—It is in the usual form, transferring all right, title and interest in and to Letters Patent No. 56,450.

Mr. MILLER.—I will read it. It seems to be executed in due form, your Honor.

The COURT.—Proceed.

Mr. ACKER.—Unless you desire to make preliminary remarks to his Honor, I shall proceed with the testimony.

The COURT.—Call your first witness.

**Testimony of Herbert Eloesser, for Plaintiff.**

HERBERT ELOESSER, called for the plaintiff, sworn.

Mr. ACKER.—Q. Will you state your name, age, residence and occupation?

A. My name is Herbert Eloesser, I am 38 years old, [21—3] I am vice-president of Eloesser-Heynemann Co.

Q. For what length of time have you acted as vice-president?

A. I have acted as vice-president for about 15 years.

Q. State what length of time the corporation of Eloesser-Heynemann Co. has been established in business in the City and County of San Francisco?

A. The corporation was established as a corporation in 1905, but the business was established in 1851, about 70 odd years ago. The business has been practically in the same family ever since the time it was first begun.

Q. Please state the class of merchandise which constitutes the product of the Eloesser-Heynemann Co?

A. The Eloesser-Heynemann Co. is making overalls and other kindred lines, such as denim coats and work pants, union suits, and a very large proportion of that business is in play suits. They make some shirts, and make some workmen's pants, but they specialize in workmen's clothing, and are exclusively manufacturers.



(Testimony of Herbert Eloesser.)

Q. Has Eloesser-Heynemann Co. a manufacturing establishment in places other than in the City and County of San Francisco?

A. They have a number of branches where they carry stock, but it manufactures its goods solely in San Francisco.

Q. Please state when the Eloesser-Heynemann Co. first commenced to manufacture the play suit garment forming the subject matter of the letters patent in suit?

A. I think that we first began manufacturing this garment in May or June of 1919.

Q. Will you please state as fully as you can the history with reference to the manufacture of the play suit by Eloesser-Heynemann Co. involved in the present controversy?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent. We are simply trying whether or not this patent is valid, and, second, whether or not it is infringed. I do not want to go into the history of the patent. [22—4]

The COURT.—What object will it serve?

Mr. ACKER.—I wish to show the manner in which Eloesser-Heynemann Co., the circumstances under which they acquire title to the letters patent in suit, and what induced the Eloesser-Heynemann Co. to take over the letters patent.

The COURT.—You want to show that, but what object will it serve?

Mr. ACKER.—It will shorten the testimony materially by giving the developments of this garment,

(Testimony of Herbert Eloesser.)

and the connection between Eloesser-Heynemann Co. and Kuh Bros. with reference to this suit and the acts of infringement.

Mr. MILLER.—I submit it is immaterial.

The COURT.—You may answer briefly. If not material, the Court will give it no consideration.

A. I will be just as brief as I can. We were requested by a large department store in Oakland, Whitthorn & Swan, to manufacture a play suit which was different from the only play suit that was being put on the market at that time.

The COURT.—Reframe your question, and bring him to something specific.

Mr. ACKER.—Q. Prior to acquiring title to the letters patent in suit, was your company manufacturing and offering for sale a play suit adapted for girls, a one-piece play suit?

A. Yes, we were.

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—I think so.

Mr. ACKER.—I hand you two garments, Mr. Eloesser, and ask you to examine the same and state if you can identify these garments?

A. Yes, Mr. Acker, I can identify this. This first [23—5] garment that I hold in my hand here is a garment covered by the patent, and it was manufactured by Miller & Macowsky, the original patentees.

Mr. MILLER.—I move to strike out the answer as incompetent, immaterial, and irrelevant. He

(Testimony of Herbert Eloesser.)

does not know what is covered by the patent. That is for your Honor. He was just asked if he recognized the garment.

Mr. ACKER.—Q. Do you recognize that as a garment manufactured by Miller & Macowsky?

A. I do.

Mr. MILLER.—It seems to me he ought to be examined as to how he knows Miller & Macowsky manufactured this garment.

The COURT.—I do not see that it is material. Proceed.

Mr. ACKER.—Q. What about the second garment?

A. The second garment is a garment which was put out by Kuh Bros. and which was a garment that follows the design which we notified Kuh Bros. was an infringement.

Q. Please examine the garment which I now hand you, and state if you can identify the garment.

A. Yes.

Q. What is that garment?

A. That is a garment which we are manufacturing at the present time.

Q. That is the garment which you are manufacturing under the letters patent in suit?

A. Yes.

Q. You have identified a garment which you said was manufactured by Miller & Macowsky. Do you mean by Miller & Macowsky the ones who procured the letters patent in suit here?

A. Yes; this is the garment that was manufac-

(Testimony of Herbert Eloesser.)

tured by Miller & Macowsky who procured the letters patent, and has the mark "Patented."

Q. How do you know that garment was manufactured by Miller & Macowsky?

A. I recognize it by the design, and by the label [24—6] on it, and by the fact that it was a garment which Miller & Macowsky gave me at the time we were in correspondence with them.

Q. Please compare that garment with the Design Letters Patent 56,450, the same being the letters patent in suit, and state whether that garment conforms thereto or diverges therefrom?

Mr. MILLER.—I object to the question as immaterial, irrelevant and incompetent.

Mr. ACKER.—We desire to show that the article was being manufactured under the letters patent in suit, and at the time that the plaintiff to the present action acquired title to the letters patent. In other words, it was not a paper patent, the patent itself was being manufactured and sold by the patentee.

\* Mr. MILLER.—I object to that as immaterial.

The COURT.—It would not prove of any materiality. The objection is sustained. Let us limit ourselves to what is material. Our experience is we always have enough to deal with with that alone.

Mr. ACKER.—Q. You have identified a garment which you said was manufactured by Kuh Bros., the defendant in the present action. How do you know that garment was manufactured by Kuh Bros., and how did you acquire it?



(Testimony of Herbert Eloesser.)

A. I acquired this garment by purchase, Mr. Acker; you asked us to obtain a garment of their design, of their manufacture, and I purchased it.

Q. You purchased it in the open market?

A. In the open market.

Mr. MILLER.—Q. From whom?

A. I do not recall, I believe it was O'Connor-Moffatt, Mr. Miller, but I am not perfectly certain.

Mr. ACKER.—Q. I hand you another garment, and ask you what that is?

A. This is a garment which is also manufactured by Kuh Bros., and was brought to me by Mr. Kuh, with the object of [25—7] showing what garments they were making, and with the intention, as he explained to me, of having us take these garments off his hands if he would discontinue manufacturing them. That is in connection with the history which I had intended to state.

Mr. ACKER.—I offer in evidence the garment which was identified by the witness as a product of Eloesser-Heynemann Co., and ask that the same be marked Plaintiff's Exhibit 3.

(The garment is marked Plaintiff's Exhibit 3.)

I offer in evidence the garment which has been identified by the witness and referred to as the first Kuh garment, and ask that the same be marked Plaintiff's Exhibit 4.

(The garment was marked Plaintiff's Exhibit 4.)

Then I offer the second garment made by the Defendant Kuh as Plaintiff's Exhibit 5.

(The garment was marked Plaintiff's Exhibit 5.)

(Testimony of Herbert Eloesser.)

Q. Were you manufacturing your garment at a time prior to acquiring title to the Letters Patent in suit. A. Yes.

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—I think so.

Mr. ACKER.—I think it is material, your Honor.

The COURT.—Why?

Mr. ACKER.—To show that these men were manufacturing this garment at a time prior to the acquiring of the letters patent in suit, and that the notification of infringement was given to them, in the action of the plaintiff under the notice of infringement.

The COURT.—Because he reasons the patent is valid, that does not have anything to do with it. The objection is sustained.

Mr. ACKER.—Q. Did I understand you to state that you had received notification of infringement from the owners of the [26—8] letters patent in suit?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—Objection sustained.

Mr. ACKER.—Q. Did you at any time acquire a license under the letters patent in suit?

A. We did.

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—The objection is sustained.

Mr. ACKER.—Q. Please state whether or not

(Testimony of Herbert Eloesser.)

any other manufacturers, firms or corporations in this city are manufacturing at the present time the play suits of the letters patent in suit other than the defendant in the present action?

A. I know of nobody else.

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—I think he may answer. It may be one way of arriving at the fact that the defendant is, as they claim, infringing. Overruled.

A. I know of nobody who is manufacturing these play suits in this city, except Kuh Bros.

Mr. ACKER.—Q. What recognition, if any, has been given to the letters patent in suit by other manufacturers?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent; the patent is *prima facie* evidence.

Mr. ACKER.—It goes to the point of proving public acquiescence in the letters patent in suit, and it is one of the allegations in the complaint that there has been acquiescence.

The COURT.—He may answer; if not competent, it will not be considered.

A. There has been a good deal of acquiescence, Mr. Acker. [27—9] There have been a number of large concerns that manufactured this garment at one time, and who, upon notification, have ceased manufacturing it.

Mr. ACKER.—Q. Please state in a general way, or please state as briefly as you can, what reception

(Testimony of Herbert Eloesser.)

the design garment manufactured and placed on the market by your concern has met with from the purchasing houses?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent, and, furthermore, it is calling for the conclusion of the witness.

The COURT.—He may answer. Overruled.

A. The garment has met with a very ready reception. At the time it was first put out there was practically nothing available except the straight-legged play suits, and a long garment of ordinary overall style, and the public was delighted to receive something that had some design feature to it, and it was attractive and pleasing to the eye, and the business has grown as fast as we are able to take care of it. We have made large increases in our plant and in our capacity, and the business has grown as fast as we could handle it.

Mr. MILLER.—I move to strike out that portion wherein he stated as to how the public received it, and were pleased with it. I think that is his conclusion.

The COURT.—It will be allowed to stand; if not material the court will not consider it; the motion is denied.

Mr. ACKER.—Q. Please state whether or not, after acquiring title to the letters patent in suit, you notified the defendant as to your claimed infringement of your letters patent by reason of the garments they were manufacturing?



(Testimony of Herbert Eloesser.)

A. We did [28—10] notify them, and they were notified before.

Mr. MILLER.—We object to that.

The COURT.—Just answer the question.

Mr. ACKER.—Q. Did either member of the firm of Kuh Bros. hold any conversation with you after your service of notice of infringement?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—He may answer. The objection is overruled.

A. Mr. Louis Kuh held a conversation with me at the time I first notified him verbally that his garment was an infringement on our design patent.

Mr. ACKER.—Q. Was any conversation held with him after you served written notice upon him?

A. Mr. Kuh wrote us a letter approximately at that time, I think it was after the notice, Mr. Ackers.

Q. I hand you Plaintiff's Exhibit 4 and Plaintiff's Exhibit 3, and ask you to examine the same and point out such similarities and such differences as you find to exist between those two garments.

Mr. MILLER.—If your Honor please, we can do that just as well as the witness. Here are the physical things that we can look at and examine, and I do not think that we would gain any advantage by having the witness point out any similarities.

The COURT.—I think he may proceed briefly.

A. I find that this garment—

Mr. ACKER.—Q. Refer to the exhibit number.

(Testimony of Herbert Eloesser.)

A. Marked Plaintiff's Exhibit 3—is a one-piece peg-top, long leg play suit, with short outstanding sleeves, and a high waist effect, and the effect of a belt joining the waist onto [29—11] the trousers portion. I find on the back that the long leg peg-top effect and short sleeves are still in evidence, with the high waist, and opening down the back, and having a drop seat. This garment, No. 4, I find, is also a one-piece long leg peg-top play suit, with short outstanding sleeves; it also has a high waist effect, and the effect of a belt joining the waist to the trousers portion. It also has in the back the same high waist effect, the long peg-top trousers and the drop seat, and it opens down the back, and I consider that the garments are practically identical in design.

Mr. MILLER.—I move to strike out the last portion of the witness' answer, where he says he considers the garments are practically identical, as being a conclusion, and not a statement of fact.

The COURT.—That is an expert's statement. It may stand.

Mr. MILLER.—They do not allow experts in design patent cases.

The COURT.—If not material or competent, the Court will give it no consideration.

Mr. ACKER.—Q. I will ask you to compare Plaintiff's Exhibit 5 with Plaintiff's Exhibit 3, and state such similarities and such differences as you find to exist between said garments?

(Testimony of Herbert Eloesser.)

A. I have already examined and described Exhibit 3. Plaintiff's Exhibit 5 I find has the same peg-top long leg trousers portion, has the appearance of a high waist, and the effect of a belt, has square outstanding sleeves, and in the back I find that it has the same peg-top long leg trousers effect, the effect of a belt, it has a drop seat, it opens down the back, it has a square outstanding sleeve. These are the points of similarity. I find that the points of difference are that they have added a small red strip in the front, the same in the back, and I consider that in no way affects the design of the garment. [30—12] I notice that the belt is not stitched down in front, but I consider that that is unimportant in the design.

The COURT.—I think you have covered it.

Mr. ACKER.—I hand you another garment, Mr. Eloesser, and ask you to examine the same, and state if you can identify that garment, and if so what it relates to?

A. This is a garment that we have very recently made up for the purposes of this suit. It is identical with our design, except that we have placed on it a red strip of ornamentation that I have referred to in connection with my analysis of the last garment, Exhibit 5. It has the same features that I have described in our garment.

Q. And it is your garment?

A. It is our garment.

Q. With that strip added to it?

A. With that strip added to it.

(Testimony of Herbert Eloesser.)

Q. In your opinion, does the addition or the absence of that colored strip appearing at the front and back of the garment, make any difference as to the design of the play suit garment?

Mr. MILLER.—I object to that question as immaterial, irrelevant and incompetent, and calling for a matter of opinion, instead of a matter of fact. I think it is something to be ultimately determined by the Court.

The COURT.—He may answer; if not material, it will not be considered. The objection is overruled.

A. I consider the design identical, and I think it would not change the design in the least if we took the red strip off of it.

Mr. ACKER.—Q. Could you readily remove the strip from the garment?

A. I could.

Q. Please do so.

A. There it is. I could remove the other strips, but that is sufficient to illustrate it.

Mr. ACKER.—I will introduce this garment, and ask that the [31—13] same be marked Plaintiff's Exhibit 6.

Mr. MILLER.—I object to it as immaterial, irrelevant and incompetent, and as cutting no figure in the case.

Mr. ACKER.—It is just like the other.

The COURT.—He may introduce it. The objection is overruled.



(Testimony of Herbert Eloesser.)

Mr. MILLER.—It is not just like the other. There is a difference in that.

Mr. ACKER.—It is no different.

Mr. MILLER.—It is different in many material respects.

The COURT.—If counsel disagree, necessarily the Court will ultimately determine it.

(The document was marked Plaintiff's Exhibit 6.)

Mr. ACKER.—Q. Does this garment differ from your regular garments?

A. That is our regular garment, with these colored strips added to it.

Q. Do I understand you to testify that Mr. Kuh, of Kuh Bros., the defendant in the present action, advised you that it had discontinued, or intended to discontinue, or would discontinue the manufacture of defendant's first garment which has been introduced in evidence here?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—He may answer; overruled.

A. Mr. Kuh did advise us that he had discontinued that.

Mr. ACKER.—Mr. Miller, you will admit, will you not, that written notice as to infringement was duly served upon the defendant?

Mr. MILLER.—No, I would like to have the notice, itself.

Mr. ACKER.—Do you wish to examine this

(Testimony of Herbert Eloesser.)

notice? Of course, the original is in the possession of the defendant.

Mr. MILLER.—I have no objection to the copy. You can [32—14] offer it in evidence.

Mr. ACKER.—I offer in evidence a carbon copy of notification of infringement of the defendant, and ask that the same be marked Plaintiff's Exhibit 7.

Mr. MILLER.—What is the date of that?

Mr. ACKER.—April 8, 1921.

(The document was marked Plaintiff's Exhibit 7.)

Q. Have you changed, altered, or varied the design of your garment since acquiring title to the letters patent in suit? A. No, we have not.

Mr. MILLER.—That is objected to as immaterial, irrelevant and incompetent.

The COURT.—The objection will be overruled. If not material it will not be considered.

Mr. ACKER.—Q. You testified that you commenced the manufacture of this design garment of the letters patent in suit during the year 1919, and I will ask you to state how the sales of the garments as placed on the market by your company during the year 1920 compared with the sales of the garment during the year 1919?

A. I have a memorandum, if I may refer to that, of the sales.

Q. That will save time.

A. In 1919 we sold 17,176 garments, in 1920 we

(Testimony of Herbert Eloesser.)

sold 32,760 garments. In 1921 we sold 134,748 garments, and in 1922 we sold 176,640 garments.

Q. How do you account, if at all, for the rapid increase in sales of this garment?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent. He has given the fact now, and anything he would say would be merely his opinion.

The COURT.—Oh, yes. Leave it to the Court to infer a public demand for it. [33—15]

Mr. ACKER.—Has your company been required to increase its manufacturing plant in any manner whatsoever in order to take care of the increased volume of trade with reference to the manufacture of the design garment in suit?

Mr. MILLER.—That is objected to as irrelevant.

The COURT.—I think so. If you have a valid patent, what is the difference how much he has manufactured, or how little; if defendant infringes it it will be enjoined.

Mr. ACKER.—According to a number of decisions, it is material, we think.

The COURT.—Let him answer. The objection is overruled.

A. We have made considerable increases in our plant which was not nearly adequate to take care of the additional and especially large increase from 1920 to 1921, which outran our capacity, and we spent considerable sums of money in enlarging our plant to take care of the additional demand and provide for future growth.

Mr. ACKER.—Q. What effect, if at all, has the manufacture and sale of the claimed infringing garments placed on the market by Kuh Bros., the defendant in the present case, had in reference to the sales of the design garment placed on the market by your house?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

Mr. ACKER.—I think, if your Honor please, it bears on the question as to confusion in the trade, as to whether or not one article has been accepted by the trade generally as the equivalent of the other.

The COURT.—Go to something specific. The objection to the present question will be sustained. Go to the specific matter [34—16] you mentioned.

Mr. ACKER.—Please state whether or not the design garment placed on the market by the defendant has caused confusion in the trade with respect to the design garment which was placed on the market by your house?

Mr. MILLER.—Objected to as immaterial irrelevant and incompetent, and further as calling for the opinion of the witness. If you have got any man who was ever confused, let him go on the stand and testify to it, but this man's testimony must necessarily be based on hearsay, or upon opinion.

The COURT.—He may answer; the objection is overruled.



(Testimony of Herbert Eloesser.)

A. We have had agents who covered a very large territory, and we find the greatest amount of trouble in selling our garments as our customers find that they can buy this infringing garment at a lesser price, and they tell us it is the same thing, and they do not see why they should have to pay more money for our garment.

Mr. MILLER.—I move to strike out the answer on the ground it is hearsay.

The COURT.—Overruled. The motion is denied.

Mr. ACKER.—No further direct examination.

Cross-examination.

Mr. MILLER.—Q. Is there a distinction in the trade between a romper and a play suit?

A. I do not believe there is any absolute distinction, Mr. Miller.

Q. I ask that, because you have testified here to play suits, using the term “play suits.” Why did you use that instead of the word “romper”?

A. Previously, Mr. Miller, the word “romper” was used more extensively, because the play suit was quite new. More recently there has come to be some distinction, but a great many people do not recognize that, and so there [35—17] is more or less confusion between the two terms, “play suits” and “rompers.”

Q. I ask you that because your patent calls for a romper, does not mention play suit at all. Why did you put that in the patent? Why was that put in the patent?

(Testimony of Herbert Eloesser.)

Mr. ACKER.—This witness did not put it in the patent. It was a patent acquired from others.

Mr. MILLER.—Q. Why is the word “romper” put in the patent instead of “play suit”?

The COURT.—If you know.

A. I think the patent was drawn up by an attorney, and that attorney did not understand the difference between the terms, because they are very nearly synonymous.

Mr. MILLER.—Q. He made a mistake in calling it a romper instead of a play suit, did he?

A. I would not say that it was a mistake, but I should say that the play suit was a more up-to-date description.

Q. Now, as a man skilled in this art, don't you know, yourself, as well as anybody else knows, and as well as I know, what a romper is in the art?

A. I should think I know as well as you do, Mr. Miller.

Q. Isn't it a short-legged garment, not a long-legged garment?

A. I think that there is considerable confusion in the minds of people on that score to-day.

Q. I will show you a garment, and ask you isn't that what is known as a romper?

A. I would call that a romper, yes.

Q. It has not got the long legs, like your garment, has it? A. No.

Q. That is a fair sample of a romper?

A. I think that may be called a romper.

Q. That would not be called a play suit, would it?

(Testimony of Herbert Eloesser.)

A. It might be called a play suit. [36—18]

Q. Would you call it a play suit?

A. I would be more likely to use the other term, but I would not be surprised if merely asking for a play suit that was what was meant.

Q. Being skilled in this art, you would know more about how to call this?

A. Probably as an expert I might call that a romper, as distinguished from a play suit.

Q. You would know instantly that was a romper, wouldn't you, as soon as it was handed you?

A. Yes.

Q. Where did you say this Exhibit 4 came from? where you got it?

A. That, Mr. Miller, is the garment that Mr. Kuh brought to me personally.

The COURT.—You have not got them labeled right, then. That is something you testified you bought in the open market. Exhibit 5 is the one you said Mr. Kuh gave you. I think there is a little confusion on that.

The COURT.—There may be. Straighten it out.

Mr. MILLER.—Take these garments and straighten them out, and then get them all marked correctly, because I misunderstood.

A. Exhibit 5, which I have in my hand, is the garment that we bought in the open market.

The COURT.—Very well.

A. Exhibit No. 4 is the garment that Mr. Kuh, himself, brought to me, the one I have in my hand.

(Testimony of Herbert Eloesser.)

The COURT.—Very well; that is straightened out now.

Mr. MILLER.—Q. When did Mr. Kuh bring you this garment, Exhibit No. 4?

A. Do you want the date, Mr. Miller?

Q. Yes.

A. I should say it was some time, as nearly as I remember, in March, 1921.

Q. What occurred between you and Mr. Kuh when he brought you this garment?

A. Mr. Kuh, when he brought us that garment, said that he was willing to recognize the patent, and that he wanted [37—19] to get out from the manufacture of an infringement without any loss, and that he would like to have us take these articles off his hands.

Q. And you agreed to take them off his hands, didn't you? A. We did not.

Q. You first agreed to take them off his hands?

A. We did not at any time agree unconditionally to take them off his hands.

Q. Mr. Kuh brought you this sample and said that was the stuff that he had been making, and he was willing to stop making that garment if you would take off his hands the garments that he had then; didn't he say that?

A. Mr. Kuh said that he would like to have us take these garments off his hands, in order to avoid having a loss if he did abstain from infringement of the patent in suit.



(Testimony of Herbert Eloesser.)

Q. And you agreed to do that for him, didn't you?     A. I did not.

Q. You did at first, didn't you?

A. I did not at any time, Mr. Miller, unconditionally.

Q. What did you say to him?

A. I said to him that if he would agree not to make any more infringing garments, we would then make an arrangement to take these garments off his hands for him.

Q. What did Mr. Kuh do with the garments after that?     A. Mr. Kuh, I understand, sold them.

Q. Don't you know as a fact afterwards Mr. Kuh took all of these garments that he had in his possession and changed them to straight-legged, instead of the peg-legged, and sold them in that way?

A. I don't know that; I understood to the contrary, that he had sold them.

Q. Don't you know, as a matter of fact, after Mr. Kuh was not able to make any arrangements with you he took over these garments and cut off the peg legs, and made straight-legged garments, just exactly like a Koverall, and then sold them in that [38—20] shape?

A. I don't know that; I understood to the contrary, that he sold the garments in that shape, as they are.

Q. I would be glad to inform you to the contrary when our evidence comes in. Now, you compared the Kuh garment, No 5, with your garment, No. 3. Do you find that your garment has the square Dutch

(Testimony of Herbert Eloesser.)

neck, or what is a square neck that is generally known as the Dutch neck?

A. I would say that our garment has what is commonly known as a square neck, although it does not look very square.

Q. Doesn't that look practically square?

A. No, not to me.

Q. How does it look, then?

A. It looks approximately square, as an operator would manufacture it.

Q. Look at your patent and tell me what kind of a neck you have; you have it there, look at your patent and tell me what kind of a neck you have there.

A. The patent would indicate a square neck.

Q. That is what is known as an ordinary square, Dutch neck, is it not?     A. I believe so.

Q. Don't you mean to say you are following your patent when you are making your own garments?

A. We are following it very closely.

Q. Then you are endeavoring to make a square Dutch neck, aren't you?     A. We endeavored to.

Q. You do not quite succeed, though, do you?

A. We do not quite succeed, no.

Q. Now, then, in the defendant's garment, do you find any square neck?

A. I find his neck is a round neck.

Q. So that whereas your patent calls for an absolutely square neck in these devices you have made a round neck: That is a difference in that respect, is it not?

(Testimony of Herbert Eloesser.)

A. Well, you might possibly consider that a difference. [39—21]

Q. Will you please answer my question: I am asking, as a matter of fact, whether you find that difference between the two garments?

A. Yes, I find that difference.

Q. You also find in your garment that you have a short sleeve, with no binding on the edge and no binding in between, so as to form a cuff.

Q. You find that difference, don't you?

A. Yes.

Q. That is known as a piping in the art, is it not?

A. I do not think that is a piping.

Q. Anyway, it is a cuff?

A. We will call it a trimming.

Q. Your garment has no cuff?

A. I would not call that a cuff. I would call it a trimming on the end of the sleeve.

Q. Your garment has no cuff? A. No.

Q. Nor cuff bottom? A. It has no cuff bottom.

Q. Your garment also has what is known as patch pockets, that is to say, they are pockets just as shown in your patent drawings? A. Yes.

Q. Has this garment of the defendant any patch pocket? A. It certainly has.

Q. Where is the patch?

A. The patch is on the inside.

Q. The pocket in this case is made as a part of the peg-top, right there.

A. Any expert will tell you that is a patch pocket.

Q. I won't get into any controversy. The pocket

(Testimony of Herbert Eloesser.)

in the defendant's garment is formed inside of the peg-top, itself, is it not?

Q. And the pocket in your garment is not formed in that way, but is formed away from the peg, and with a curve, and on the side of the garment, itself?

A. Yes.

The COURT.—The patch is sewed on the outside?

A. Yes, our patch is sewed on the outside.

Mr. MILLER.—Q. That is the way it is shown in the patent, is it not. A. I should say so.  
[40—22]

Q. Now, in this garment, Exhibit 5, you find this yoke effect, consisting of a red binding that goes up toward the neck of the garment, would you not?

A. I would not call it a yoke effect.

Q. What do you call it?

A. I would call it some red trimming.

Q. Do you find that on this, whatever you call it?

A. No.

Q. It is not in your patent at all, is it?

A. It is not in that position in our patent.

Q. You find also that same trimming in the form of a yoke on the back of the defendant's garment, do you not? A. I find trimming on the back.

Q. That is substantially the same as it is on the front, is it not?

A. I think you have the back and front confused; this is the back.

Q. Then on the front, you find it also? A. Yes.

Q. You find also on the defendant's garment a belt that can be buttoned or unbuttoned, as the case requires, do you not? A. Yes.



(Testimony of Herbert Eloesser.)

Q. Do you find any such belt on this?

A. I find the effect of a belt.

Q. What do you mean by the effect of a belt?

A. A thing that looks like a belt from a distance.

Q. That is simply a piece of goods stitched in there so as to connect the upper and lower parts of it together?

A. A band that is put across the front and has the effect of a belt.

Q. Just a binding that is as old as the hills in children's garments: That is all it is, is it not—a straight band right across, that is what it is?

A. You ask me if it is as old as the hills?

Q. Isn't a band a very old device?

A. Every element of that is old; it is merely the arrangement of them that I consider novel.

[41—23]

Q. You find no belt on this, at all?

A. I do find a belt.

Q. You mean you find this band? Do you call that a belt? A. I call that a belt.

Q. Does it button over?

A. It does not button.

Q. It is stitched in there permanently, is it not?

A. It is stitched in permanently.

Q. You spoke something about a drop seat: Is that in your garment, too? A. Yes.

Q. Where is it in the patent?

A. I should say that it is right here.

Q. It is not shown in the patent at all, is it?

(Testimony of Herbert Eloesser.)

A. I should say it is probably included in the patent.

Q. How is it indicated?

A. It is indicated by the fact that there are buttons across there; it may be presumed that is going to drop down.

Q. That is what might be presumed, but it is not shown in the patent?

A. I should say it is shown as clearly as could be shown in a black and white illustration.

Q. Do you think this garment of yours is a very aesthetic, ornamental thing?

A. I think it is very aesthetic and ornamental.

Mr. MILLER.—That is all.

The COURT.—Any redirect examination?

Mr. ACKER.—I omitted to introduce in evidence an exhibit, if your Honor please. If you have no objection, Mr. Miller, I will put it in now.

Mr. MILLER.—If it is material, I have no objection. I do not object to the time you are offering it.

The COURT.—Offer your exhibit.

Mr. ACKER.—Q. Mr. Eloesser, please examine these photographs I hand you and see if you can identify them, and, if so, what they are?

A. This first one, Mr. Acker, is a picture of a model [42—24] which I had taken a few days ago of the garment that we have submitted in evidence here, as I believe, Exhibit No 3, Eloesser-Heyenmann Co. garment.

(Testimony of Herbert Eloesser.)

This next picture is the same model, except manufactured by Kuh Bros., which I purchased in the open market, I believe it is Exhibit No. 5. This is a back view of the same model dressed in the same Eloesser-Heynemann Co. garment, and this is the back view of the same model dressed in the Kuh Bros. garment.

Q. Were those photographs taken under your personal supervision?     A. Yes.

Mr. MILLER.—I object to these photographs as immaterial, irrelevant and incompetent; it seems that the witness, or somebody under him, has gone to work and dressed up a child to suit themselves, and evidently they have been posed, and the garments arranged to make them as near similar as possible, all of which was done outside of our presence, and I think that the photographs are immaterial.

The COURT.—Overruled.

Mr. ACKER.—I offer these in evidence, and ask that the same be marked as Plaintiff's Exhibit 8.

(The photographs were marked Plaintiff's Exhibit 8.)

Q. You have used the expression "play suit" in your testimony, and you were questioned by counsel under cross-examination with reference thereto. Please state whether or not that has become a term utilized in the trade to designate this type of garment?

A. It has become a term, Mr. Acker, which is not entirely accepted, yet, but it is rapidly becoming so.

(Testimony of May White.)

Q. And goods are so ordered, under that name?

A. Yes.

The COURT.—Call your next witness. [43—25]

**Testimony of May White, for Plaintiff.**

MAY WHITE, called for the plaintiff, sworn.

Mr. ACKER.—Q. Please state your residence and occupation?

A. 2331 Telegraph Avenue, Oakland, California, buyer at Upright's Store, in Oakland.

Q. What department of Upright & Company in Oakland are you the buyer of?

A. I have several departments, the Baby Department, Women's Ready-to-wear, including all of the outer garments except suits, coats and hats.

Q. Does the department of which you are buyer of Upright & Company handle what are known as play suits? A. They do.

Q. Can you describe the style or design of the play suits which are handled by your department, purchased by you for Upright & Company as buyers?

A. We handle several play suits, because we call most any garment that the kiddies play in play-suits. The only one we do not call a play suit is Levi Strauss' Koverall.

Q. Are you familiar with the play suit which was manufactured and placed on the market by Kuh Bros., of San Francisco, and also the play suit which is manufactured and placed on the market by Eloesser-Heynemann? A. I am.



(Testimony of May White.)

Q. Do you handle those designs of play suits in your department of Upright & Company?

A. I handle both of them.

Q. And to which play suit do you give preference if at all in the placing of your orders for play suits?

A. I buy more of Kuh Bros. play suits, because they are a little cheaper, and, naturally, working for the interest of the department, I must buy the one that costs less money to buy.

Q. Do these play suits which have been introduced in evidence, Plaintiff's Exhibit 3 and Plaintiff's Exhibit 5, represent the play suits which you have testified about as being purchased [44—26]

A. They do.

Q. From your experience in selling these children's play suits, would, in your opinion, customers who came to purchase from your establishment play suits to match the plaintiff's design, if shown the defendant's design of play suit, believe that it was a designed garment similar to that of the plaintiff's?

A. They would.

Mr. MILLER.—That question is objected to as immaterial, irrelevant and incompetent, and calling for the opinion of the witness on a matter concerning which the opinion is not proper. The rule is, you cannot call an expert and ask him his opinion as to whether one would be mistaken for the other.

The COURT.—I think she may answer, but if not material the Court will give it no consideration.

Mr. ACKER.—Q. As a buyer for Upright &

(Testimony of May White.)

Company, please state whether or not in your opinion those two play suits represent the same design garment?

Mr. MILLER.—I object to the question, if your Honor please, as immaterial, irrelevant and incompetent, and as calling for an expert opinion, where an expert opinion is not competent or proper.

The COURT.—She may answer. If not competent, the Court will give it no consideration. The objection is overruled, and an exception may be noted.

Mr. MILLER.—We save the point.

A. I can only speak from the amount of orders that I, myself, placed on play suits. I bought the Kuh garments simply because they were peg-topped, and that was all they would ask for when they wanted these garments. It does not make any [45—27] difference to the department as to the trim of the garment, that is all they ask for, peg-top, they did not ask anything about the belt, or anything, and I bought them just because they were peg-topped, and I bought the cheaper ones, because it would show better if I paid less money for the garment for the department.

Mr. ACKER.—Q. In the placing of these garments on display in your department, did you make any difference as to the arrangement of the garment, that is to say, were they all placed together, or kept separate?

Mr. MILLER.—Objected to on the same grounds as the preceding question was objected to.

(Testimony of May White.)

The COURT.—She may answer; overruled.

Mr. MILLER.—Exception.

A. The garments were kept all together, according to the sizes; if they ask for a peg-top, we naturally show a cheaper garment; if they want them by name, we show them whatever they ask for, such as the Kute Kut.

Mr. ACKER.—Q. That is to say, if they ask for a Kute Kut garment, they are shown the garment of Eloesser-Heynemann Co.?

A. Yes, and if they ask for the peg-top we naturally show the cheaper garment.

Q. Why is it, if you can buy the product of Kuh Bros. at lower figures than you can purchase from Eloesser-Heynemann Co., that you carry the Eloesser-Heynemann garment at all?

A. Because if they ask for a Kute Kut, we want them in stock. We do not want to say that we have not got them, the same way as we carry Koveralls and play suits, if they ask for a Koverall, we give it to them.

Q. In your opinion, does the fact that the play suit garments of Kuh Bros. disclose the colored stripes on the waist and on [46—28] the sleeves make it a different designed garment from that of Eloesser-Heynemann Company?

Mr MILLER.—Objected to as immaterial, irrelevant and incompetent, and not calling for a fact, but for an opinion concerning which the witness is not competent to testify.

(Testimony of May White.)

The COURT.—She may answer; if not material the Court will give it no consideration.

Mr. MILLER.—Exception.

A. No; the trimming would have nothing to do with it, they look alike.

Mr. ACKER.—That is all.

Cross-examination.

Mr. MILLER.—Q. What is the trade name of Eloesser-Heynemann garments, the trademark?

A. Kute Kut.

Q. It is Kute Kut, is it? A. Yes.

Q. Is that on the garment, itself? Just look and see. A. It usually is on those that we buy.

Q. Those that you buy have a ticket, a white ticket, with the trademark “Kute Kut” on it, and a little picture of a garment?

A. Of a peg-top garment.

Q. And all that you sell have that on it, haven’t they? All of these garments that you sell for Eloesser-Heynemann Company have that on it?

A. If the garment comes from there, yes, I believe it would have.

Q. This garment that has been put in evidence here as Exhibit No. 3 leaves off that trademark, does it? A. I have never really noticed.

Q. I am speaking of this garment here; there is no trademark on this garment at all, is there?

A. I do not see it.

Q. Now, if a person came into your store and said they wanted a Kute Kut garment, what would you hand them out? [47—29]



(Testimony of May White.)

A. I would hand them out a little peg-top Kute Kut bought from Eloesser-Heynemann.

Q. You would not think of handing them out the garment that you were selling for Kuh Bros.?

A. No, because you have a different name there.

Q. By what name is the Kuh Bros. garment sold?

A. "Jim Dandy."

Q. Is that shown there, too?      A. Yes.

Q. So that when anybody comes in and asks for Kuh Bros. Jim Dandy garment, you would not think of handing them Eloesser-Heynemann's?

A. I have never had anybody ask me for Jim Dandy; they usually ask for a peg-top.

Q. Suppose a person came in to you and asked for a Kute Kut garment, what would you hand them?

A. The peg-top, but I would give them the garment with the Kute Kut name on it.

Q. The term "Kute Kut" is connected with Eloesser-Heynemann's firm, is it not, in the trade?

A. I could not say.

Q. If a person came and asked for "Kute Kut" you would hand him out that garment?      A. Yes.

Q. The name "Jim Dandy" is connected with Kuh Bros.?      A. Yes.

Q. If any purchaser came in and asked you for Jim Dandy, you would hand him a Jim Dandy garment?

A. I certainly would give the one that had the name on it.

(Testimony of May White.)

Q. You would not try to defraud a person by passing off one of these garments for them?

A. No.

Q. But you would try to give each person what he wanted, would you not? A. Yes.

Q. Now, then, the majority of the people coming in there ask you for a peg-top play suit?

A. Yes, they want the peg-top.

Q. When they ask you for a peg-top play suit, what do you hand them?

A. You understand that this is only speaking for the department. If they ask for a peg-top, the cheaper garment is [48—30] shown, because, as I say, it costs less money, and we sell that garment more than this.

Q. You would not try to defraud anybody?

A. No.

Q. They just simply ask you for a peg-top garment, and because this garment has a peg top you conclude that that answers the requirements of the purchaser, and you hand him out that garment?

A. No, only because there is a better profit shown on the cheaper garment. That is why they hand it out.

Q. That answers the purchaser's requirements, does it not, of a peg top?

A. It is just the same, because they are the only garments that have the peg-top.

Q. Peg-top garments have been known for many years, have they not?

(Testimony of May White.)

A. I have never seen the long-legged peg-top before this.

Q. You have seen short-legged peg-tops, have you not?    A. The little wash suits, yes.

Q. What is the difference between a play suit and a romper?

A. It is only of late that we call these play suits, as far as my experience goes. Formerly, we called all of them Koveralls, but we were notified not to do so, so we called them play suits.

Q. You mean you called rompers play suits?

A. We did not call rompers play suits.

Q. You called rompers by their own name of rompers, did you not?

A. It all depends on what you call a romper; but the public may come in and ask for something for the kiddies to play in, rompers, play suits, or anything.

Q. That is, there is a distinction in the trade between rompers and play suits?

A. Sometimes they ask for the thing which isn't what we think it is.

Q. There is a distinction in your mind?

A. Yes, there is in my own mind.

Q. Between rompers and play suits?

A. In my own mind, yes. [49—31]

Mr. MILLER.—That is all.

#### Redirect Examination.

Mr. ACKER.—Q. You stated on cross-examination that customers now and then ask for these play suits under the name Kute Kut?    A. Yes.

(Testimony of James B. Mullen.)

Q. Have you ever had anyone come into your store and ask for this play suit under the name Jim Dandy?     A. Never in my life.

**Testimony of James Mullen, for Plaintiff.**

JAMES B. MULLEN, called for the plaintiff, sworn.

Mr. ACKER. Q. What is your age, residence and occupation?

A. 43; I reside in Fresno, California; I have a small jobbing house of men's furnishing goods. Besides that, I have traveled and represented Eloesser-Heynemann Co. in the San Joaquin Valley.

Q. What territory did you cover?

A. From Tracy to Bakersfield.

Q. Are you familiar with the garments that are involved in the present controversy?     A. I am.

Q. That is you are familiar with Kuh Bros. and Eloesser-Heynemann Company's garments?

A. Yes.

Q. I understood you to state that you sold within your territory the play suit product of Eloesser-Heynemann Co.?     A. I did.

Q. Please state whether or not you have experienced any difficulty with reference to the sale of play suits within your territory by reason of the play suits manufactured and sold and placed on the market by Kuh Bros. the defendant in the present case?     A. I have had.

Q. Please name some concerns.



(Testimony of James B. Mullen.)

A. George B. Sshaeffer Co., Modesto, Kuttner-Goldstein, Madera, Radin & Kamp, of Fresno, Sweet Co., of Visalia.

Q. What do you mean by you have had difficulty with these parties in connection with the sale of the Eloesser-Heynemann [50—32] product?

A. They could buy the Kuh garment considerably cheaper, and it takes the place of our garment.

Q. What do you mean by that "it takes the place of our garment"?

A. They make things so identical that they do not see the difference in it, and will accept it in place of the Kute Kut.

Mr. MILLER.—I move to strike that out.

The COURT.—I think it may stand in the record. The motion will be denied.

Mr. MILLER.—Exception.

Mr. ACKER.—Q. Have any of your customers expressed to you the opinion that the garments were the same?

Mr. MILLER.—I object to that as calling for hearsay testimony.

The COURT.—Sustained.

Mr. ACKER.—Q. Has the placing on the market of the play suit by Kuh Bros. affected the sale in your territory, by you of the play suit of Eloesser-Heynemann Company?

Mr. MILLER.—I object to that as calling for the opinion of the witness by deduction instead of giving us the facts.

The COURT.—The objection is sustained.

Mr. ACKER.—Q. I hand you a series of photographs, and ask you to examine the same and state whether or not in your opinion the photographs disclose the same design play suits?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent. We are not sued on a photograph, we are sued on a patent.

The COURT.—Sustained.

Mr. ACKER.—Q. Please examine the two exhibits, Plaintiff's Exhibit 3 and Plaintiff's Exhibit 5, and state whether or not, in your opinion, as one conversant with this line of merchandise, they display the same design garment?

Mr. MILLER.—I object to that as calling for the conclusion [51—33] of the witness, and not the proper kind of testimony to be given as to whether designs are the same.

The COURT.—Have you any authority for it?

Mr. ACKER.—I think we have authority, your Honor, that the garments should be compared side by side and express an opinion as to whether or not they display the same design.

The COURT.—I would like to see the authorities.

Mr. ACKER.—I think I can give you those after the recess hour.

The COURT.—I would imagine in a case of this importance you would come in fully prepared to meet the issue.

Mr. ACKER.—We are fully prepared on the law, but not on that particular point. I withdraw the question.

(Testimony of Paul Heynemann)

Q. Would, in your opinion, the fact that there is a colored strip or a colored ornamentation applied to the defendant's garment differentiate it from the design garment of the plaintiff's manufacture?

Mr. MILLER.—I object to that as calling for purely an opinion of this witness.

The COURT.—It goes right back to the same question.

Mr. ACKER.—I withdraw the question. Take the witness.

Mr. MILLER.—I have no questions.

**Testimony of Paul Heynemann, for Plaintiff.**

PAUL HEYNEMANN, called for the plaintiff, sworn.

Mr. ACKER.—Q. Please state your age, residence and occupation?

A. 2721 Clay Street residence; occupation, I am in charge of sales of Eloesser-Heynemann Company.

Q. How long have you been acting in the capacity of salesman or head salesman of Eloesser-Heynemann Company?

A. Just about a year and a half, that I have held the title, although I have [52—34] been connected with the sales department for about four years.

Q. You are familiar with the two garments involved in the present controversy, are you not?

A. I am.

Q. Have you visited the various stores in the city

(Testimony of Paul Heynemann.)

and county of San Francisco, and noted how the play suit garments are displayed in the stores?

Mr. MILLER.—I object to that as immaterial and irrelevant.

The COURT.—That is merely preliminary. I think he may answer.

A. I have visited some stores.

Mr. ACKER.—Q. Are they prominent stores of this city?

A. Yes. I have visited stores like O'Connor-Moffatt, Marks Bros., and Magnin's.

Q. How are the goods displayed in those stores which you have referred to?

Mr. MILLER.—I object to the question as immaterial, irrelevant and incompetent.

The COURT.—He may answer. The objection is overruled.

Mr. MILLER.—Exception.

A. Ordinarily, they are displayed by piling them on shelves; once in a while on counter display, with a suit on a model, and once in a while also in the windows on models, or draped over special racks.

Mr. ACKER.—Q. Is there any distinction made in the houses where you have noted the products of the defendant and the plaintiff on sale, as to how these goods are offered for sale, I mean kept separate and distinct?     A. No.

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent, for the reasons heretofore stated.



(Testimony of Paul Heynemann.)

The COURT.—The objection is overruled. [53—35]

Mr. MILLER.—Exception.

A. There is no distinction. The garments of our manufacture and those of Kuh Bros. are piled together. According to my experience, the first one that happens to be on top is handed out to the customer, who comes in the store.

Mr. ACKER.—Q. That is, if it happened to be the proper age and size?

A. If they happen to be of the proper age and size; they are arranged by sizes invariably.

Q. Can you state whether or not there has been any diminution in the sales of Eloesser-Heynemann Co., by reason of the manufacture and sale by Kuh Bros. of the claimed infringing garment?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent, and further as not calling for the best evidence; this is only a salesman, and he is not presumed to know from the books of the company if the sales have been reduced.

The COURT.—The objection is sustained.

Mr. ACKER.—Q. How are these suits usually designated in the trade?

A. They are designated as the peg-top child's garment, with long legs, high waist.

Q. Are they known as a one-piece garment?

A. One-piece garment, yes.

Q. Are these garments made for use of boys or for the use of girls?

(Testimony of Paul Heynemann.)

A. Primarily for the use of girls.

Q. And they were gotten up for that purpose?

A. They were gotten up for that purpose, that was our original plan.

Q. Did your house ever manufacture a play suit adapted for girls prior to the taking on of the manufacture of the play suit of the letters patent in suit?

A. Not during my connection with the firm.

Q. Your connection has extended for what period of time? [54—36]

A. For about four years or a little over.

Q. Have you ever, as the head salesman of Eloesser-Heynemann Co., received any orders from outside territory wherein they have cancelled orders for the play suit of Eloesser-Heynemann Company by reason of the fact that they could purchase the same suit from Kuh Bros. at a less price? A. Yes, I have.

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent, and as also calling for secondary evidence.

The COURT.—The objection will be overruled, he may answer. If not entitled to any consideration, none will be given to it.

A. Yes, we have.

Mr. ACKER.—Q. From whom?

A. I remember one instance of one of our salesmen in Southern California, by the name of Walburn.

Q. Explain a little more fully.

(Testimony of Paul Heynemann.)

A. In this particular case we received an order, or a copy of an order, in which certain items which had been ordered from us were scratched out, and there was a notation on the bottom by our salesman, Mr. Walburn, saying that those items should be eliminated, because they could obtain for a less price, the same garment, and he mentioned the lot and price of Kuh Bros. illustrating definitely that they could get the same garment for a less price, and, therefore, we should not ship those particular items.

Mr. MILLER.—I move to strike out the answer as immaterial, irrelevant and incompetent, calling for secondary evidence.

The COURT.—I am rather inclined to agree with you, but we will let it stand. The motion is denied.

Mr. MILLER.—Exception.

Mr. ACKER.—That is all. [55—37]

Cross-examination.

Mr. MILLER.—Q. What is the trademark of Eloesser-Heynemann Company, as applied to these peg-top, long-leg play suits?

A. "Kute Kut."

Q. How is that trademark applied to the garment?

A. There is a cloth label on the garment, and that name is printed on the cloth label.

Q. That cloth label is sewed on to the garment?

A. Yes.

Q. Is there any such trademark shown on this

(Testimony of Paul Heynemann.)

garment which has been put in evidence here as Exhibit 3?

A. There is no such label.

Q. Why is the label left off of this one?

A. I am sure I do not know.

Mr. MILLER.—That is all.

The COURT.—Call your next witness, if any.

Mr. ACKER.—Mr. Miller, this label has not been left off; it has been accidentally misplaced, and it is in the pocket of the garment; as it was handled, it has been torn off; in other words, it has not been intentionally removed; it was torn off and put in the pocket. That is all.

The COURT.—Is that your case?

Mr. ACKER.—Yes.

Mr. MILLER.—If that is the label that goes with them, it is not the label described by the witness at all. I want you to produce one of the labels with the name Kute Kut on it that is attached to your various garments?

Mr. ACKER.—There it is.

Mr. MILLER.—Do I understand you to say that this is the label that is attached?

Mr. ACKER.—There it is. That is the way they are arranged, and that is the way they are attached.  
[56—38]

Mr. MILLER.—Very well, I will offer this in evidence.

Mr. ACKER.—I will pin it to the garment.

The COURT.—One of your witnesses ought to know where they put that label. It ought to be put on there if you produce it as a facsimile.



(Testimony of H. Garfinkel.)

Mr. ACKER.—It shows in one of the photographs.

The COURT.—All right.

**Testimony of H. Garfinkel, for Plaintiff.**

H. GARFINKEL, called for the defendant, sworn.

Mr. MILLER.—Q. Mr. Garfinkel, what is your business?

A. At the present time in the retail business.

Q. Have you ever been in the business of manufacturing these play suits? A. Yes.

Q. When did you commence in that?

A. In the city, here, on Market street, 585 Market street.

Q. How long ago was that?

A. Well, probably, let me see, about three years, I guess.

Q. Was it before Miller & Macowsky began manufacturing their garments?

A. I originally got a sample of the Miller & Macowsky garment, there was a salesman that came up to sell me some denims, and he brought up a sample that Miller & Macowsky made up.

Q. What kind of a sample?

A. A garment with a peg top, similar to the Kute Kut.

Q. Was it the Kute Kut? A. Not at that time.

Q. What was its name?

A. I named it the Micky.

Q. You mean the garment which you got up?

A. Yes.

(Testimony of H. Garfinkel.)

Q. Did you sell your garment under the name of the Micky? A. The Micky, yes.

Q. I will hand you a garment now and ask you what this garment is?

A. This garment is not my Micky. After I went out of business [57—39] I told Mr. Feiesel, that was connected with the baby shop, that since I was going out of business it would probably be advisable for him to make these garments up. I told him that name belongs to me, that he could use the word Micky, and he registered the name for his own protection.

Q. Was that a garment that you made?

A. The original garment that I made up and sold to department stores; in fact, I was the first one to put them on the market in quantities, a garment similar to this.

Q. When did you put these garments on the market?

A. Well, I could not exactly say the exact date, approximately, I guess it was—when was the armistice signed, in 1917 or 1918?

The COURT.—November, 1918.

A. That is right, approximately around that time.

Mr. MILLER.—Q. About what time did you go out of business?

A. Say about seven or eight months after that.

Q. Then you sold out to the Art Shop?

A. No, the Art Shop was mine; I sold out to Spiecki, manufacturers of ladies' dresses.

Q. I will show you a bill here and ask you if you

(Testimony of H. Garfinkel.)

can recognize what that bill is, and what it represents?

A. 24 dozen Mickys at \$9.50 a dozen.

Q. To whom did you sell those?

A. E. J. Feisel.

Q. That is the bill for them?

A. That is the bill for them.

Q. What was the date of the bill?      A. April 23.

Q. What year?      A. 1919.

Q. Were those Micky garments similar to the one that you hold in your hand now?      A. Yes.

Mr. MILLER.—We offer this garment in evidence and ask that it be marked Defendant's Exhibit "A," Micky.

(The garment was here marked Defendant's Exhibit "A," Micky.) [58—40]

We also offer in evidence the bill that has been identified by the witness, dated April 23, 1919, calling for 24 dozen play suits, Micky, \$228, and ask that it be marked Defendant's Exhibit "B."

Q. I show you another bill and ask you what that represents?

A. That is the same thing, Micky.

Q. That is dated what?      A. April 24, 1919.

Q. And calls for how many Micky play suits?

A. One dozen.

Q. That is at \$9.50?      A. Yes.

Mr. MILLER.—I offer this in evidence, and ask that it be marked Defendant's Exhibit "C."

Q. What is this paper which I now hand you?

A. I presume it is the same class of goods.

Q. What is the paper, an order?

(Testimony of H. Garfinkel.)

A. It is an order, yes.

Q. For these goods?      A. Yes.

Q. Was this order turned in to you?

A. Turned in to me.

Q. To your company?      A. Yes.

Q. And in pursuance of that order you furnished the goods of which these bills are evidence?

A. I don't know where that entire order was delivered. That was an order, but whether that particular order was delivered, or not, I am not in position to tell you right now.

Q. What kind of goods was this order?

A. The very same goods.

Q. Micky play suits?      A. Yes.

Q. What is the date of it?      A. April 10, 1919.

Q. That is about the time that you received the order for these goods?

A. Approximately, I suppose; it reads that way.

Mr. MILLER.—We offer this in evidence, and ask that it be marked Defendant's Exhibit "D."

(The document was marked Defendant's Exhibit "D.")

Q. Prior to receiving this order last mentioned from Mr. Feisel, [59—41] had you manufactured any of these Micky play suits?

A. Oh, yes, we made up stock.

Q. About how much of a stock did you have?

A. I could not tell you right now; we probably made up a hundred dozen or so.

Q. Had you sold any of that stock to anybody else?



(Testimony of H. Garfinkel.)

A. Yes, we sold them to the Emporium and to other people.

Q. And this order from Feisel you received on the 10th of April? A. Yes.

Q. And you filled that order, did you?

A. I don't know. The other bills would probably explain that. That is part of the order. The order was given on the 10th of the month, and the bill reads on the 19th, so that must have been a part of the order that was delivered on the 19th.

Mr. MILLER.—That is all.

Cross-examination.

Mr. ACKER.—Q. This garment you manufactured under the name of Micky was copied from the play suit of Miller & Macowsky?

A. Yes.

Mr. MILLER.—Q. Did Miller & Macowsky have any goods on the market at that time?

A. I am not in a position to say; I do not think so.

Q. What makes you say you do not think so?

A. Because this gentleman, Mr. Lewis, the salesman that sells piece goods, came up to the place one day and wanted me to buy a lot of khakis and denims, and in order probably to make the sale made me believe that it would be a good idea to make this garment up and put it on the market before Miller & Macowsky started to make them, or anybody else started to make them, and, of course, I started to make them.

(Testimony of H. Garfinkel.)

Q. Did you show the garment to Miller & Macowsky?    A. My garment?    [60—42]

Q. Yes.

A. No, Miller & Macowsky came up to the factory one day and Mr. Macowsky, I believe he made a kick, in fact he told me there was a patent pending, and it would be advisable for me not to make them; and it was for that very reason that I stopped making them a short time after. I did not want to get involved. If there was a patent applied for at that time I did not know.

Q. Did you say anything to him about your getting up the garment?    A. To who?

Q. Macowsky?

A. Macowsky was in my factory, I did not invite him up there but somebody else brought him up there and he was nosing around, and saw me, and gave me friendly advice, and I took it.

Q. That was after you had made them up?

A. After I had made a bunch of them up.

Q. And sold them?    A. And sold them.

Q. Then when you first got up your garment, how did you get that up?

A. By following Macowsky's garment.

Q. Where did you get Macowsky's garment?

A. Mr. Lewis brought it up to the place, a salesman that sold me denims and other fabrics, and khakis.

Q. What time was that?

A. That was perhaps around about probably a month or so later, I don't know exactly the date, but Mr. Lewis is still alive, you can verify that by subpoenaing him, and he will tell you.

**Testimony of A. S. Lowenstein, for Defendant.**

A. S. LOWENSTEIN, called for the defendant, sworn.

Mr. MILLER.—Q. What is your business?

A. House manager for E. J. Fiesel.

Q. How long have you been in that business?

A. Since he first started in business, since September, 1913. [61—43]

Q. Do you know anything about the purchase of any play suits from the California Art Works, run by the witness who was last on the stand?

A. Why, yes, we placed an order.

Mr. ACKER.—If your Honor please, I object to this as absolutely immaterial, in view of the fact that Mr. Garfinkel admitted that the goods he made were goods that he copied from the patentees of the patent in suit.

The COURT.—We will hear him; if not material it will be given no consideration.

A. We placed an order with Mr. Garfinkel, who had a partner at that time—I don't know the gentleman's name—on April 10, 1919, and I don't know just how many dozen we placed an order for, but my impression from Mr. Garfinkel at that time, and also conveyed to Mr. Feisel, was that it was a garment that he procured from an Eastern firm through an Eastern salesman, and we were also very friendly with Miller & Macowsky at the time, and Miller & Macowsky knew that we were selling them, and our first delivery was April 23, if I am not mistaken.

(Testimony of A. S. Lowenstein.)

Q. That is, the delivery from Garfinkel to you?

A. Delivery from Garfinkel to us.

Q. On April 10 you say you turned in the order?

A. We placed the order with the California Art Works.

Q. That was the company that Mr. Garfinkel was representing?

A. I understood he was a partner.

Q. Did Miller & Macowsky have any garment on the market at that time?

A. I used to see Mr. Miller every day; after we had sold them some time he told me that he was making that garment, but whether he had a garment on April 10, 1919, I could not answer "Yes" or "No"; I don't think it was on the market. If I am not mistaken, I think we were the first ones to deliver the garments in San Francisco. [62—44]

Q. What was the extent of your trade after that?

A. Well, we sold quite a few; we had on our garments the word "Mickey," and as Mr. Garfinkel has told you here he turned over the word to the Baby Shop, and they had copyrighted the word "Mickey," and the minute that was done we discontinued the manufacture of the garment entirely, in order to incur no trouble.

Q. Is this the name of your concern, shown on Exhibit D, "E. J. Feisel"?      A. Yes.

Q. You are with that firm?      A. Yes.

Q. Here is an order dated April 10, 1919: Is that the order for these Micky suits?

A. That is a copy of the original order that was given to the California Art Works.



(Testimony of A. S. Lowenstein.)

Mr. MILLER.—That is all.

Cross-examination.

Mr. ACKER.—Q. Can you state whether or not Miller & Macowsky were in business at the time you gave your order to Mr. Garfinkel?

A. Yes, they were directly opposite us if I am not mistaken, at the time.

Q. And had been in business for some time?

A. Yes.

Q. What did Miller & Macowsky manufacture?

A. Miller & Macowsky at that time, if my memory serves me correctly, were making nothing but rompers, making rompers in the style of the Patsy rompers, and there was a lawsuit at that time with him on the Patsy rompers; I do not think he was making play suits, as I said before; I think that we were the first ones to place these on the market, if my memory serves me correctly.

Q. That is the one you received from Mr. Garfinkel?

A. That is the one we received through Mr. Garfinkel.

Mr. MILLER.—Q. Did either Macowsky or Miller ever tell you where they got their design from for these play suits?

Mr. ACKER.—That is objected to as immaterial, irrelevant [63—45] and incompetent, and calling for hearsay evidence.

The COURT.—We will hear it. If not material or competent the court will give it no consideration.

A. If my memory serves me correctly, I think

(Testimony of A. S. Lowenstein.)

Macowsky was a salesman of Miller & Macowsky's firm, and he saw the garment in my house, and he said, "This is a very good garment," and he is going to make it; that is as far as I know; whether he was the originator of the design, I could not answer.

Q. But he saw the garment in your house?

A. Yes, we were very friendly with Mr. Macowsky all the time, and he used to come in and we used to pass personal courtesies to one another.

Q. He said he thought it was a very good garment and he was going to make it?

A. He was going to make it and get a patent on it.

Mr. ACKER.—Q. Did you have this garment in your house prior to obtaining them from Mr. Garfinkel?

A. No.

(A recess was here taken until two P. M.) 64—  
46]

#### AFTERNOON SESSION.

Mr. MILLER.—I will offer in evidence a book entitled, "The Dutch Twins," which appears upon its face to have been copyrighted in 1911, and has a notation that it was received in the public library here on May 24, 1915. If necessary, I will call the Librarian to prove when it was received, only I apprehend there will be no question about the publication of the book.

The COURT.—Is counsel familiar with it?

Mr. ACKER.—No objection to it.

(The document was marked Defendant's Exhibit "E.")

Mr. MILLER.—I also offer in evidence Patent Office copy of U. S. Design Letters Patent No. 51,674, of January 8, 1918, issued to Simon E. Davis, of San Francisco, California, assignor, to Levi Strauss & Co., San Francisco, a corporation, entitled, “Design for Children’s One-Piece Outer Garment.”

(The document was marked Defendant’s Exhibit “F.”)

I also offer in evidence Patent Office copy of United States Design Letters Patent No. 52,720, of November 19, 1918, issued to William I. Zidell, of Los Angeles, California, entitled “Design for Children’s Rompers.”

(The document was marked Defendant’s Exhibit “G.”)

I also offer in evidence Patent Office copy of U. S. Design Letters Patent No. 54,809 of March 23, 1920, issued to William I. Zidell, of Los Angeles, California, entitled, “Design for Child’s Romper.”

(The document was marked Defendant’s Exhibit “H.”)

I also offer in evidence Patent Office copy of United States Letters Patent No. 1,255,491, of February 5, 1918, issued to Mary T. Verde, of Boston, Mass., entitled, “Child’s Garment.”

(The document was marked Defendant’s Exhibit “I.”) [65—47]

I also offer in evidence Patent Office copy of United States Design Patent of June 15, 1915, to George Averill, of Los Angeles, California, entitled “Design for Doll.”

(The document was marked Defendant's Exhibit "J.")

I also offer in evidence Patent Office copy of United States Design Patent No. 60,958, of May 16, 1922, to Louis Kuh, of San Francisco, California, entitled "Design for Child's Garment."

Mr. ACKER.—What is the purpose of the offer?

Mr. MILLER.—That being a patent which covers the design of the defendant which is charged to be an infringement in this case, showing that the defendant is operating under a U. S. patent.

Mr. ACKER.—You are not justifying his acts under these letters patent?

Mr. MILLER.—No; I am offering these letters patent in evidence to show that since suit was commenced the garment which is being designed or being sold by the defendant has been covered by a design patent, thereby drawing the inference that the defendant's design was a patentable design and differing from all other designs that preceded it. Of course, it is not a justification to any acts that he may have done if those acts are otherwise acts of infringement. But it shows the fact, the presumptive fact that his design is different from the others because of the issuance of the patent.

Mr. ACKER.—We object to the introduction of the letters patent, if your Honor please, on the ground that it is immaterial, irrelevant and incompetent, and based on an invention that was created since the issuance of the letters patent in suit, and



(Testimony of Simon E. Davis.)

does not in any way affect or justify the act of infringement. [66—48]

Mr. MILLER.—I am not offering it as a justification.

The COURT.—It will be admitted, and in so far as incompetent or immaterial the court will give it no consideration.

Mr. ACKER.—Exception.

(The document was marked Defendant's Exhibit "K.")

Mr. MILLER.—I also offer in evidence a certified copy of the file wrapper contents of the design Letters Patent of Charles Miller and Peter Macowsky No. 56,450, of October 26, 1920, the same being the letters patent in suit here.

(The document was marked Defendant's Exhibit "L.")

**Testimony of Simon E. Davis, for Defendant.**

SIMON E. DAVIS, called for the defendant, sworn.

Mr. MILLER.—Q. What is your business?

A. I am in the gent's furnishing goods business.

Q. Have you ever been connected with any firm here? A. I was.

Q. What firm?

A. Levi Strauss & Company.

Q. How long has that company been in business?

A. I don't know; about 60 years, I think, I am not sure.

Q. How long were you connected with it?

(Testimony of Simon E. Davis.)

A. 28 years.

Q. Are you familiar with this art of children's garments, including rompers and play suits, and one thing and another like that? A. I think so.

Q. What has your experience been in regard to these matters?

A. I put the Koverall on the market for Levi Strauss & Co.

Q. Were you the inventor of that Koverall?

A. I was.

Mr. ACKER.—The question is objected to as immaterial, irrelevant and incompetent; it has nothing to do with the question here involved before the court.

The COURT.—It is identifying the witness; he may answer briefly; overruled. [67—49]

Mr. MILLER.—Q. What is the significance in the trade of the term "romper"?

A. As I understand it, a romper is a child's garment with short sleeves, and I always understood it had an elastic at the bottom of the leg.

Q. I will hand you a garment here and I will ask you if you can state what that garment is; just examine it?

A. I would call that a romper.

Q. What kind of a neck do you find there?

A. Commonly known as a square neck.

Q. What kind of sleeves?

A. Short sleeves.

Q. Do you find any binding on the sleeves?

A. Yes.

(Testimony of Simon E. Davis.)

Q. In the shape of a cuff? A. Yes.

Q. What do you find with regard to anything in the shape of a yoke?

A. It has a yoke with trimming on it.

Q. Is that the red binding that comes up in the form of a yoke, there? A. Yes.

Q. What kind of pockets do you find on it?

A. Patched pockets.

Q. Where do you say are located the legs of the garment?

A. Well, they are supposed to be sort of blouses, they come away up, away above the knees.

Q. The child's leg goes through this opening here? A. Yes.

Q. There is a kind of elastic in there?

A. I want to qualify that; this is not a romper, it is called a creeper; it is shorter than a romper. This is for an infant; the garment is made for infants who crawl around the floor and the legs are even shorter than a romper leg, and they open down here so that the mother can put diapers on the baby.

Q. Then when the child gets a little older it has the rompers? A. Rompers or play suits.

Q. How do the rompers differ from this garment?

A. The romper has a little longer leg, and there is elastic in it, and they [68—50] build them up a little bit.

Q. How long have garments of this kind been on the market?

(Testimony of Simon E. Davis.)

A. Longer than I have been living. I don't know how long.

Q. Ten or fifteen years?

A. I would think so, more than that.

Mr. MILLER.—We offer this garment in evidence and ask that it be marked Defendant's Exhibit "M."

Q. I don't know, Mr. Davis, whether you know the fact, or not, but I will hand up this garment to you, and ask you if you know anything about a garment of this kind being on the market?

A. I have seen garments of that type on the market; I have never seen that particular garment.

Q. You spoke of a Koverall garment. I will show you a patent which was issued to Simon E. Davis, which has been marked Defendant's Exhibit "F." State what the garment therein delineated is?

A. This is a copy of my application for a patent for children's Koverall.

Q. What date was that issued?

A. January 8, 1918.

Q. Is that the garment which you refer to as being originated by you and called Koveralls?

A. Yes.

Q. Just describe briefly what that garment is?

A. A Koverall is a sort of improvement on a romper or play suit. It is a garment to wear over the clothes, or as a suit of clothes in itself to protect the child's body.

Q. In order to shorten up the matter, I will ask



(Testimony of Simon E. Davis.)

you if this garment which I now hand you is one of the Koveralls made under your patent?

A. It is.

Q. How long has that garment been on the market? A. Since 1914, I think.

Q. What kind of a neck do you call this?

A. That is a Dutch neck or square neck.

Q. The sleeves are what?

A. These are elbow sleeves, commonly [69—51] known as short sleeves.

Q. What is this arrangement of red?

A. Piping.

Q. What is this red band extending across here?

A. That is a simulation of a belt.

Q. Sewed into the garment?

A. Sewed right on to the garment.

Q. This opens up in the back vertically?

A. Vertically and horizontally, both; it has a drop seat.

Q. The legs, of course, are long?

A. Supposed to reach to the bottom of the shoe.

Q. I notice on this garment a label, Koverall, Registered U. S. Patent Office, Levi Strauss & Co., San Francisco, California; that is the trademark, I suppose, of Levi Strauss & Company?

A. Yes.

Q. Have these garments been sold to any great extent? A. To a very large extent.

Q. Where? A. All over the United States.

Q. Ever since the date when they were put on the market by Levi Strauss & Company.

(Testimony of Simon E. Davis.)

A. Yes.

Mr. MILLER.—We offer this in evidence and ask that it be marked Defendant's Exhibit "N," Koverall.

(The garment was marked Defendant's Exhibit "N," Koverall.)

Q. I show you a garment which has been marked Plaintiff's Exhibit 3, bearing on it a label "Kute Kut," etc., and ask you if you are familiar with this garment?

A. This is the label that belongs on the garment?

Q. Yes.

A. Yes, I am familiar with that garment.

Q. I now hand you another garment, which has been marked Plaintiff's Exhibit 5, with a label on it, saying "Jim Dandy," and ask you if you are familiar with that garment? A. I am.

Q. You have seen both of these garments on the market? A. I have.

Q. Now, I wish you would compare these two garments, Exhibit No. [70—52] 3 and Exhibit No. 5, and state what differences you find between these garments, as a person skilled in this art? This Exhibit 3 you may call the Kute Kut.

A. The Kute Kut has a square neck, and the Jim Dandy has a round neck; the Kute Kut has no cuff, or binding, or piping in the sleeve, other than at the end, and the Jim Dandy has. The Kute Kut has no yoke or no binding where the yoke is, and the Jim Dandy has. I am just taking the front now. The Kute Kut has outside

(Testimony of Simon E. Davis.)

patch pockets and the Jim Dandy has inserted pockets. The Kute Kut has the simulation of a belt and the Jim Dandy has the belt. That is the only difference I can see in the front of the garment.

Q. Now take the back.

A. On the back the same remarks apply to the sleeves, the same remarks apply to the yoke, and that is all.

Q. Now, in view of these differences, and of the similarities that there are between the two garments, in your opinion would a person desiring to purchase one of the Kute Kut garments and using ordinary caution and care that purchasers of these garments use, be deceived into taking the Jim Dandy garment for the Kute Kut, if the Jim Dandy were offered him in place of the Kute Kut?

Mr. ACKER.—The question is objected to as merely calling for an expression of opinion of this witness, the same objection that Mr. Miller made as to the plaintiff's witnesses.

Mr. MILLER.—I am entitled to show it if he was entitled to.

The COURT.—We have excluded testimony in reference to opinion, and we will do the same now.

Mr. MILLER.—I understood your Honor to admit testimony of the opinions as witnesses as to whether or not there would be such similarity as was calculated to deceive?

The COURT.—I don't think so. [71—53]

Mr. MILLER.—I know I objected to it very

(Testimony of Simon E. Davis.)

strenuously at the time, but your Honor let it in, and all I can do is to follow the same course with my witnesses.

Mr. ACKER.—My recollection is you sustained an objection to a similar question.

The COURT.—My recollection is that I did. This is a case where the Court would not be influenced at all by any opinion. It will take its own eyesight when it comes to determining whether the designs are alike or there has been any infringement. The objection will be sustained.

Mr. MILLER.—We note an exception.

Q. In order to get the matter on the record in the proper form, your Honor,—in view of the differences which you have pointed out between these two garments, do you think there would be any likelihood of a person being deceived, who was seeking to buy a Kute Kut garment if he was offered the Jim Dandy garment?

Mr. ACKER.—I make the same objection, if your Honor please, to this question as I made to the previous one.

The COURT.—The objection will be sustained.

Mr. MILLER.—Exception.

Q. These garments, I understand, are for children, are they, Mr. Davis?     A. Yes.

Q. Running from what ages?

A. Up to 10 or 12—I would say 10 years.

Q. As high as 10 years?     A. I would think so.

Q. And going down as close as what?     A. 1.

Q. They are graded according to age?



(Testimony of Simon E. Davis.)

A. Yes.

Q. Who are the people who generally purchase these garments at retail? A. Mothers or women.

Q. Has it been in your experience to note that mothers are rather particular examining garments of this kind when they are [72—54] desirous of purchasing them for their children, that is to say, do you know what degree of care they try to exercise?

Mr. ACKER.—That question is objected to as immaterial, irrelevant and incompetent, and calling for an expression of opinion.

The COURT.—I think so. The objection will be sustained.

Mr. MILLER.—Exception.

Q. How did you happen to design the Koverall?

A. My little girl was about 2 years old, 2½ years old, and I live down at Burlingame, and a friend of mine made her a present of a romper, and that, I thought, was very pretty, it was a little above the usual romper in value that was sold in those days; rompers used to sell around 50 cents, but this romper cost about \$2.50, was what I considered a very clever little thing. It was a Dutch romper, and had short sleeves, and was made out of very fine material, and I thought it would be a very nice thing if we made a suit and put it on the market for children that would look good and yet be serviceable, so I sort of evolved the Koverall from that garment.

Q. How long were the legs?

(Testimony of Simon E. Davis.)

A. They were short legs, they were romper legs; they had elastic in them.

Q. Did they have a square Dutch neck?

A. Yes.

Q. How long have you been acquainted with the peg-tops to children's suits?

A. I don't know what you mean by peg-top.

Q. I mean a top that flares out at the hips, and then comes in below.

Mr. ACKER.—The question is objected to, except as it is limited to the peg-top type of garment in suit.

The COURT.—We will hear the answer; so far as not competent or material it will not be considered. The objection is overruled and an exception by counsel noted.

A. This garment from which I evolved the Koverall was known as [73—55] the Dutch romper, it had a flare on it, but was not a long-legged but a short-legged garment, with elastic in the legs, and I simply lengthened my garment; I did not make hardly any flare; in fact I simply increased the size of the body and made a large garment to fit over the other clothes; I have no knowledge of any long-legged flare-out garment.

Q. I am referring to a flare-out garment of any kind, whether short or long sleeves.

A. I copied that, that is how I evolutionized that Koverall from that garment, which was a flare-out garment.

Q. The flare was out at the hips?      A. Yes.

(Testimony of Simon E. Davis.)

Cross-examination.

Mr. ACKER.—Q. Mr. Davis, in referring to your design Letters Patent No. 51,674, and with the suit before you, I understood you to describe it as having a belt; is that correct?

A. That is no belt; that is a simulation of a belt.

Q. Then when you said a belt you meant a simulation of a belt?

A. I did not say a belt; I said a simulation.

Q. Do you find in the plaintiff's garment a simulation of a belt?     A. Yes.

Q. You pointed out to the Court the difference which you found to exist between the plaintiff's garment and the defendant's garment, and I will ask you, with the two garments before you, to point out the similarities which you find to exist between these two garments, this garment which I now hand you being Exhibit 3 of plaintiff, and the one you have in your hand being the defendant's garment.

A. All I can say is this, that there is a great similarity between all of the garments.

Q. I am asking you between these two.

A. You want to know what similarity there is between the two?

Q. Between these two garments.

A. They are blue, made out of [74—56] blue denim, both of the same shape, and they are both trimmed in red, the same shade of red, both have long legs, both have a flare at the hips; they have

(Testimony of Simon E. Davis.)

two pockets each, they both have about the same length sleeve.

Q. Do they each disclose a short waist effect play suit?

A. No, I would not say that. One has a high waist effect and the other has the low waist effect.

Q. Do they each disclose the long leg, peg-top, one-piece comparatively short waist effect belt?

A. No, one has a belt effect and one has a belt.

Q. This has the belt effect and the other has the belt? A. Yes.

Q. You have been making your comparison from the front; viewed from the rear, please point out the similarities?

A. Outside of the material, itself, I would say they are not similar from the back.

Q. You give it as your opinion that the shape of the two garments is not substantially the same?

A. No, I do not say that. I say the shape is substantially the same.

Q. Do you find in the defendant's garment a belt or the simulation of a belt?

A. A simulation of a belt.

Q. That holds true as to plaintiff? A. Yes.

Q. Did you at any time, on behalf of Levi Strauss & Company, make up patterns for a one-piece, long leg, peg-top, short waist effect garment?

A. Yes.

Q. Did you discontinue your intent to manufacture it by reason of the letters patent in suit?

A. I will have to answer that indirectly, if I



(Testimony of Simon E. Davis.)

may. I knew that the plaintiff had purchased either the patent outright, or an interest in this patent, and out of regard for him I did not make it.

Q. You abandoned your idea?

A. I abandoned the idea, I thought it was poor business. [75—57]

Mr. MILLER.—You thought it was poor business, you say?

A. I did not think it was quite ethical, I did not think it was right to.

**Testimony of Miss L. V. Richards, for Defendant.**

MISS L. V. RICHARDS, called for defendant, sworn.

Mr. MILLER.—Q. Are you employed in business? A. Yes.

Q. By whom? A. O'Connor-Moffatt.

Q. Have you charge of any department there?

A. Children's.

Q. About how long have you been there?

A. About eight months.

Q. Are you acquainted with the children's play suits that are sold by O'Connor, Moffatt & Co.?

A. Yes.

Q. What play suits do they sell?

A. We carry Kute Kuts, Koveralls, and Jim Dandies.

Q. The Kute Kuts are garments manufactured by what concern? I show you Plaintiff's Exhibit 3, and ask you if you recognize that garment?

(Testimony of Miss L. V. Richards.)

A. That is a Kute Kut.

Q. That is one manufactured by Eloesser-Heynemann Company?     A. Yes.

Q. You sell these in your store, do you?

A. Yes.

Q. Here is the other one, the Jim Dandy; do you sell that one also?     A. We carry the Jim Dandy.

Q. What is the difference between the Jim Dandy and the Jane Dandy?

A. One is for a boy and the other for a girl.

Q. That is the only difference between them?

A. No. There is a difference in the front of them. This one has a fullness in front and the other one has not.

Q. Have you sold garments like Exhibit 5?

A. We sell that one for the girls.

Q. And you sell the two garments that have been referred to here, the Kute Kut and the Jim Dandy; is that true?     A. Yes. [76—58]

Q. Who generally comes in to purchase these, what classes of people?     A. Mothers.

Q. What degree of care do they use in selecting the different garments that they want?

A. They usually come and tell us what they want.

Q. How do they ask for these things?

A. They come and ask for Kute Kut, Jim Dandy, or Koveralls.

Q. Has anybody ever come in and asked you for Kute Kuts and you handed them out Jim Dandies?     A. No, we carry both.

(Testimony of Miss L. V. Richards.)

Q. And you sell them by the names, do you?

A. Yes.

Q. Now, as a person acquainted with this business, do you think there would be any liability for a purchaser, using ordinary caution, to be deceived between these two garments? A. No.

Mr. ACKER.—The question is objected to as calling for a mere expression of the opinion of the witness, the same question that was asked before and objected to.

The COURT.—Sustained.

Mr. MILLER.—Q. Will you please point out the differences that you detect between these two garments, from examining them with ordinary care?

A. A sewed-in belt.

Q. That is, the Kute Kut has a sewed-in belt, you say? A. Yes.

Q. What else?

A. Pockets, square neck, short sleeves, peg top.

Q. Now, the other one has what?

A. This one has a yoke.

Q. Which is the yoke there?

A. This part, here, and then it has a fullness through here that they like for girls.

Q. What do you mean by "fullness"?

A. A fullness from the yoke down, which makes a difference effect garment than the other one.

Q. This red border that you have here is the yoke? A. This is the piping.

The COURT.—Q. Is that the yoke at the back?

(Testimony of Miss L. V. Richards.)

A. That is the yoke sewed on. [77—59]

Q. There is a yoke on the back sewed on?

A. Yes. You see, there is a fullness in here that the other hasn't. That gives the fullness for a girl that is not given for a boy; that a boy does not need.

Mr. MILLER.—Q. What is the shape of the neck here?

A. Round; the other is square; this has a cuff, the other one has not a cuff; one has a patch pocket, and the other has not.

Q. I show you another one of these Jim Dandy garments, which I have ripped apart.

A. I know at a glance that it has a yoke.

Q. This one that I have ripped apart shows the yoke, does it?

A. Yes, the other one has not a yoke; the other is simply a bodice sewed on to the trousers.

Q. This fullness that you speak of is shown in front?

A. Oh, yes, they like that especially for girls; it is especially adapted for girls.

Q. In view of these differences, do you think it is possible for one to be mistaken for the other?

A. No.

Mr. ACKER.—The question is objected to, if your Honor please, as calling for a mere expression of opinion of the witness.

The COURT.—I think so, sustained.

Mr. MILLER.—Exception. I entirely agree with your Honor on the law proposition involved



(Testimony of Miss L. V. Richards.)

there, but I objected to these very questions that were asked by the plaintiff, and that was the ground of my objection. The only reason I am asking them now is because my recollection is that similar questions were asked of plaintiff's witnesses.

The COURT.—If they were, I think they were all sustained. I think it was the statement of the Court if they were not material or competent, they would not be regarded. I am satisfied now they are immaterial, and will not be regarded, [78—60] but you are proceeding properly to save your point.

Mr. MILLER.—As a matter of fact, has anyone, to your knowledge, ever been deceived in buying one of these garments in your store?

A. No; that is the reason why we keep all of them, so as to please the customers.

Q. You would just as leave sell one as the other?

A. Equally so.

Cross-examination.

Mr. ACKER.—Q. Does one sell just as readily as the other? A. Equally so.

Q. You pointed out the difference between the defendant's garment and the plaintiff's garment; I will ask you, with these garments before you, to point out the similarities between the two?

A. The only similarity is they both are blue suits.

Q. Do you find each to be a one-piece peg-top play suit? A. They are each one-piece.

(Testimony of Miss L. V. Richards.)

Q. And peg-top? A. Yes.

Q. Each has the outstanding short arm?

A. This one has short sleeves; one has a cuff, the other has not, one has a round neck and the other has not.

Q. You are now referring to the differences.

The COURT.—You are showing the witness the front of one and the rear of the other.

A. I know them so well I can tell the back from the front.

Mr. ACKER.—Q. Are these garments sold for the use of little girls and boys?

A. Yes. This is one is especially adapted for girls. You can sell either one if they ask for it, but women prefer that for girls.

Q. But they are more adapted for girls than boys; is that true? A. Yes.

Q. I understood you to say one of the garments had piping on the pocket and the other had not: Is that correct? A. On the peg. [79—61]

Q. You mean that the pockets are pegged?

A. The pockets are put in differently; one pocket is put in on the outside, and one on the inside.

Q. Now, referring to the defendant's device, do you find the outline of the patch pocket?

A. The outline, yes; that part is inside and this one is outside.

Q. The outline of the pocket does appear on the exhibit to which I have directed your attention?

A. Yes. You would have to have some stitching to keep the pocket in.

**Testimony of Louis Kuh, for Defendant.**

LOUIS KUH, called for the defendant, sworn.

Mr. MILLER.—Q. What is the name of your firm, Mr. Kuh?     A. Kuh Bros., Inc.

Q. How long have you been in business?

A. About 25 years, the firm has, altogether.

Q. You have been selling these play suits here, have you?

A. We were the first firm to manufacture play suits on the Pacific Coast.

Q. What kind of play suits did you manufacture?

A. We made all kinds of play suits, Koveralls, rompers, creepers, and all kinds of play suits.

Q. What kind of long-legged play suits did you first make?

A. We made what was called a “Stick-in-the-mud” suit, that we used to sell to Weinstock-Lubin in Sacramento, it was a long-leg peg play suit—could I describe it by one of these?

Q. Yes.

A. It was a long-leg peg suit, and it had a longer sleeve on, and it had a little collar coming down, like a man’s collar, on each side; it had a band in front like this, and had this drop seat, and had straight legs.

Q. Like this?

A. Like the Koverall; it had straight legs like [80—62] the Koverall, and we manufactured it about ten or fifteen years ago, and we supplied

(Testimony of Louis Kuh.)

Weinstock Lubin with the goods. It was called the "Stick-in-the-Mud" suit, I believe, something like that. It was a garment that sold for 50 cents retail.

Q. What is this garment in blue and white that I show you now?

A. You would not call that a play suit; that is a little boy's wash suit, what they call a little boy's wash suit. The reason why we gave you that was we manufactured that about five years ago, to show you that we manufactured long-leg pegs, as we called them.

Q. What was the date of that, about how many years ago?     A. About six or seven years ago.

Q. This has a collar?

A. The garment we made for Weinstock-Lubin at Sacramento had collars like that.

Q. It did not have the square Dutch neck?

A. No, it did not.

Q. But had the attached collar?     A. Yes.

Q. That had the peg trousers, also?

A. The peg trousers, yes—oh, no, the garment manufactured for Weinstock-Lubin did not have the peg trousers.

Q. It had straight trousers?

A. It had straight trousers, like Levi Strauss' Koveralls. We were the first one to make play garments on this coast.

Q. What do you mean by play garments?

A. I mean there is no such word as "peg"; it is



(Testimony of Louis Kuh.)

just a fullness on the side. I mean there is no such word as "peg" as applied to that.

Q. This garment that I am handing you now, in blue, is cut with a flare?

A. With a flare; it is not a peg; a peg is something that stands out straight like that.

Q. Did you sell any of these play garments?

A. Of course we sold them, but we have no records, because we did not keep our records so far back; we are only a small concern, and we do not [81—63] keep those records.

Q. This style has gone out of vogue?

A. It is a sort of novelty; we make it one season and do not make it again; it is not staple like other garments, like the play garments.

Q. But you did make these garments and sell them?

A. Yes, we made them up and sold them.

Mr. MILLER.—We offer this garment in evidence, and ask that it be marked Defendant's Exhibit "O."

(The document was marked Defendant's Exhibit "O.")

Q. Now, Mr. Kuh, tell me about any dealings or negotiations you had with Miller & Macowsky before they turned over the patent to Eloesser-Heynemann Company?

A. Well, here was the dealings that we had with Miller & Macowsky; one day we received a letter from Miller & Macowsky that they had secured a patent on that garment that we were

(Testimony of Louis Kuh.)

manufacturing, that garment similar to the one being made by Eloesser-Heynemann Company, that garment you have over there.

Q. Is this the garment?

A. Yes, we made that up in various materials, including blue denim, khaki, etc.; we had been making up that garment, we never knew that anybody had a patent on it, and one day we were notified—you have got the date of the letter there, I don't remember the date, but it was in 1921, that we were notified by Miller & Macowsky that they had a patent on that garment, and we were very much surprised at the same, and I went over to see Mr. Feisel, of the Baby Shop, who I knew was selling these garments, Mr. E. J. Feisel, who was the man that testified this morning, and they claimed that they had been making that garment the whole time, and that it was made by a man by the name of Garfinkel, and that Miller & Macowsky had got the garment from Garfinkel.

Q. I want to get your dealings with Miller & Macowsky. [82—64]

A. Well, as I said before, they wrote us a letter that we were infringing, and account of bad feeling we had between the two firms we did not pay any attention to the letter, and then Mr. Macowsky 'phoned up one day that he wanted to see me; he came over, and my brother I. D. Kuh was present at the time, he said, "Boys, I want to be friends with you," he said, "You are making up a garment that is an infringement upon my gar-

(Testimony of Louis Kuh.)

ment," and he said, "I wish you would stop manufacturing that garment." So I said, "All right, we will let up," and we stopped manufacturing the garment, on the condition that we could sell that stock we had, and he said that would be perfectly satisfactory to him if we would stop manufacturing the garment altogether, and we promised to do so, so we did; so we started to sell the stock out that we had left.

Q. You did stop manufacturing?

A. We stopped manufacturing the garment as soon as we had this conversation with Mr. Macowsky, and that was satisfactory to him.

Q. He agreed that you could sell what you had on hand?

A. He agreed in the presence of my brother that we could sell the garments that we had on hand.

Q. Now, I show you this garment which was handed you a moment ago and ask you if this is the one that you had talked about?

A. This is the garment. We formerly called it the Jim Dandy, and now we call it the Jane Dandy.

Mr. MILLER.—We offer this in evidence and ask that it be marked Defendant's Exhibit "P."

(The garment was marked Defendant's Exhibit "P.")

Q. Now, did you dispose of that stock which was on hand?

A. We disposed of nearly all of it except about 100 dozen.

(Testimony of Louis Kuh.)

Q. What happened in regard to those?

A. Can I tell this in my own way?

Q. Yes. [83—65]

A. I had several conversations with Mr. Eloesser at the time that Miller & Macowsky claimed that they had a patent, and we were talking the matter over of going together to fight them on the thing, because we did not believe that they had a patent on it, or that they had a right to have a patent on that garment, because garments with the fulness, with the flare, and also long-legged garments and short waist garments had been made up before, so I talked this matter over with Mr. Eloesser and one day he surprised me very much by 'phoning to me and saying, "Mr. Kuh, that thing is off, because we have bought out patent rights from Mr. Macowsky," that they had made some agreement with Mr. Macowsky that they could also manufacture the garments; so he called one day, a little later on, I don't know—we have got the letters there, though—I think he came over and he notified us that they had bought the patent rights out for that garment, and that we should stop selling them. Well, I went over to see him, or he came over to our place, and he said, "Mr. Kuh, why don't you sell us out the stock you have on hand"? So I said—I did not like the idea, but I will consult with my brother, that is, my brother Irwin, who is present here—I consulted with my brother, and so I sent him a sample over of the stock that we had on hand, I don't just remember



(Testimony of Louis Kuh.)

what we had on hand, it might have been a hundred dozen, or 150 dozen, or 75 dozen, I could not just remember what we had on hand, and I did not receive any reply from him. Then I wrote him a letter—you have got the letter right here—and told him that I had not heard anything from him, that he promised to buy these goods and he hadn't come through, and then he replied to the letter that he did not agree to purchase them at any certain price, so then the matter ended right there, as far as we were concerned. Then, as I say, we had about 100 dozen garments left [84—66] over, and as we were starting to manufacture a new garment, we thought it best to avoid any controversy, or anything like that, so what did we do but—Mr. Eloesser said the only objection he had to our garment was that we were putting that little fullness on the side; he claimed that was the only thing that was wrong with it; he claimed that if we would make a garment just like Levi Strauss made their Koveralls, and like we always made up garments before, then he would have nothing against it, we could continue making it; he said the only thing he objected to was the peg—so what did we do? We took that hundred dozen garments and cut out the flare, and made them a straight garment, just like Levi Strauss' Koveralls, the garments that we had always been making, we made a straight garment, we cut them off and sewed them up and sold them to a store in Sacramento, and you have the invoices there, the

(Testimony of Louis Kuh.)

copy of the invoices on the yellow sheets, showing that we sold them.

Q. When you went to Eloesser-Heynemann with this stock that was on hand, which was 75, 100 or 150 dozen, what goods were they?

A. They were the flare goods.

Q. Were they what had been left over from the stock that you had when you talked with Macowsky? A. Yes.

Q. And they were the same goods which Miller & Macowsky had told you you could sell?

A. Yes, the same goods.

Q. And they are represented by this device here?

A. Yes.

Q. Represented by Exhibit "P"? A. Yes.

Q. Then after Eloesser-Heynemann refused to take these goods off your hands, then you say you cut out the pegs and made them straight legs?

A. Cut out the flare and made a straight leg like the Koverall, or like the other garments we were selling.

Q. And then sold them to this man in Sacramento?

A. Sold them to this man in Sacramento, and you have got the copies of the invoices [85—67] there.

Q. What did you do then about getting up another garment?

A. The fact of the matter is that when we first heard that Macowsky claimed that he had a patent on this garment, we had decided that we would

(Testimony of Louis Kuh.)

get out another garment, so I sent for Miss Loeb, of the Emporium, she is the manager of the Children's Department in the Emporium, and I sent for Miss Loeb, and Miss Loeb has bought quite a few of our products, and I said, "Miss Loeb—"

Mr. ACKER.—I do not think this is at all material.

Mr. MILLER.—Q. Just tell what happened, without any conversation.

A. We sent for Miss Loeb and showed her two garments I had there, and from those two garments we originated our new garment, this one here,—from the little pink garment and that garment there—that is how we originated that garment.

Q. You mean the little pink one?      A. Yes.

Q. And the blue garment?

A. Yes; we took the yoke from this garment, here, and we took the peg from this garment, and put the two into one garment.

Q. Exhibit "M" is the pink one?

A. Yes, we joined these together—

Q. (Intg.) Wait a minute. The other one is Exhibit "O"?      A. Yes.

Q. Now, then, you joined these two garments together into one garment?

A. Into this garment.

Q. From that you produced this garment here, Exhibit 5?      A. Yes.

Q. There is one other garment I will hand you and ask you if you can tell what that is?

(Testimony of Louis Kuh.)

A. That is a romper.

Q. Whose garment is that?

A. I think that is a garment made in Los Angeles—a Patsy, isn't it?

Q. Yes. Is that what is known as the Zidell garment?     A. Yes.

Q. They have a square neck there, have they?

A. Yes.

Q. And short sleeves?     A. Yes.

Q. A cuff on the sleeves?

A. Yes, and this band. [86—68]

Q. In front?     A. Yes.

Q. And they have pegs to the sides of the garments there, have they?     A. Yes.

Q. And they have a cuff down at the bottom here?     A. Yes; that is a romper.

Q. But they have no long legs?

A. No, that is for smaller children.

Q. If you wanted to put two long legs on that it would be exactly the same thing as this patent, would it?     A. Just exactly the same thing.

Mr. MILLER.—We offer this in evidence as Defendant's Exhibit "Q." That is all.

(The garment was marked Defendant's Exhibit "Q.")

Cross-examination.

Mr. ACKER.—Q. Did I understand you to say that you collaborated with Miss Loeb in the design of the garment which you are now placing on the market?     A. Yes.



(Testimony of Louis Kuh.)

Q. So that that was a sort of joint idea of yours and Miss Loeb's together? A. Yes.

Q. Nevertheless, you applied for letters patent on that garment, did you? A. Yes.

Q. You applied for it in your own name?

A. Yes.

Q. And you took the oath that you were the sole inventor of it?

A. Yes, the sole inventor, because those were our garments—this was our design.

Q. What do you mean by that?

A. Miss Loeb helped me just like a designer in our place would help me.

Q. This is the garment I understand you are now making, which is Plaintiff's Exhibit 5: Is that correct? A. I don't know the number of it.

The COURT.—Q. That is your garment?

A. Yes. [87—69]

Mr. ACKER.—Q. Did I understand you, or did you wish to have the court understand, that this is not a peg-top, long-leg garment?

A. No, I don't wish the court to understand that at all. It is a long-leg straight garment. I don't know what you mean by "peg"; there is no such word as peg.

Q. You have never advertised it as the peg trouser? A. Oh, we have, yes, advertised.

Q. What do you mean by the word "peg"?

A. That is a name that has been applied for a Los Angeles concern for quite a while, Zidell, they called it a peg, they were the first inventors of it.

(Testimony of Louis Kuh.)

Q. Is this an advertisement which emanated from your house?     A. Yes.

Q. I notice a cut appearing on it.     A. Yes.

Q. That is a picture of this garment which you are now manufacturing?     A. Yes.

Q. I note you state on the card that you have just been granted original United States Letters Patent?

A. Yes.

Q. What do you mean by the word "original"?

A. Original, because I don't think they would grant a patent unless it was original.

Q. Then every patent, in your opinion, would be an original patent?

A. As far as I know; I am not very well acquainted with it.

Q. You are using it in that sense?

A. That is original, we consider that an original patent.

Q. Wherein does this differ from your former garment?

A. Do you want me to tell the difference?

Q. Yes, the device that you abandoned and discontinued the manufacture of?

A. In the first place, the Kute Kut has a Dutch neck. [88—70]

Q. I am not referring to the Kute Kut; where do you differ from the former garment?

A. We differ from the former garment in this way, here, that instead of being a square neck, we made a round neck, instead of having a plain sleeve we made a cuff; we also placed a yoke in front and the back. It is not a band just placed across, it **is**

(Testimony of Louis Kuh.)

a separate piece, it gives it fullness here for a girl, it gives a lot of fullness in front. And we did the same thing in back. Another thing, we did not put a high waist line on there, we have no high waist line like was claimed originally; we have no waist line at all; that is all loose from the yoke down. We do not place any pockets on the outside, and our pocket is different-shaped, altogether, because it goes all around; their pocket is just a little patch pocket. Another thing, we have the band cuffs, and then we have this extension here with a piping all around to protect it from ripping.

Q. You have testified as to certain conversations you had with Mr. Eloesser; is it not a fact that Mr. Eloesser agreed that he would purchase from your firm such of these play suits as you had on hand, take them off your hands, provided you would discontinue the manufacture of play suits? A. Yes.

Q. Was it not for the reason that you refused to discontinue the manufacture of them that Mr. Eloesser refused to take them off your hands, the goods you had?

A. That particular garment we did discontinue.

Q. Did you not show Mr. Eloesser the garment you are now making and he state to you that he considered that to be just as much an infringement as the other garment?

A. Yes, he did, and I told Mr. Eloesser that he was entirely wrong, that it was a different garment altogether, and he said, "Mr. Kuh, I give you credit for getting out a nice garment." [89—71]

(Testimony of Louis Kuh.)

Q. Did this conversation which you have reference to take place at your office, or at the office of Eloesser-Heynemann Company?

A. It was probably about two years ago, isn't it, something like that, I could not just remember now—it is about two years ago, I believe; I know Mr. Eloesser was over in our place once, and I was over in his place once.

Q. At which of these conversations was it which you have referred to, that your brother was present?

A. My brother?

Q. Your brother. I understood you to say your brother was present at this conversation.

A. My brother was present at this conversation?

Q. I am asking you?

A. No, I don't just remember that.

Q. Was your brother present at any conversation that you held?

A. I cannot just remember whether he was or not.

Q. Is Mr. Irwin Kuh your brother?      A. Yes.

Q. The gentleman sitting over there?      A. Yes.

#### Redirect Examination.

Mr. MILLER. Q. What conversation was it that your brother was present at that you referred to a moment ago?

A. I referred to a conversation with Mr. Macowsky.

Q. Not with Mr. Eloesser?

A. No. He was present at the conversation with Mr. Macowsky, when Mr. Macowsky came over in our place.



(Testimony of Louis Kuh.)

Q. Did you make any memorandum of the conversation at that time?     A. Yes.

Q. What became of the memorandum?

A. I think I gave it to you with some other papers.

Q. Where did you put the memorandum?

A. We kept all of these different things in a safe.

Q. Is this paper which I now hand you connected with this matter in any way, shape or form?

A. This is a memorandum.

Q. What was the occasion of making that?

A. Well, Mr. Macowsky [90—72] was in, and he wanted us to discontinue making these garments, and we kind of made up, we were bad friends for a while, and we made up, and he said, “Boys, I will treat you all right, you can sell the garments you have got on hand.”

Q. Who made this memorandum?

A. I did. This is my writing.

Q. That was made at the time?

A. About that time that we received the letter from Mr. Macowsky; then he came over to see us.

Q. Does this memorandum embody what Mr. Macowsky said? Just read it over and see.

Mr. ACKER.—If your Honor please, it does not appear that this is proper redirect examination.

The COURT.—The objection is sustained.

Mr. MILLER.—It is just simply to show that he made a memorandum of the occurrence at that time.

Q. Does this memorandum serve to refresh your recollection in any way regarding the conversation

(Testimony of Louis Kuh.)

with Mr. Macowsky, and the agreement to let you sell the stuff that was then on hand?

A. I made a memorandum of all these things.

Q. Anyway, you did make a memorandum of it at the time?

A. I made a memorandum of everything connected with this proposition.

Q. And that is the memorandum which you now hold in your hand?     A. Yes.

**Testimony of Irwin D. Kuh, for Defendant.**

IRWIN D. KUH, called for the defendant, sworn.

Mr. MILLER. Q. Mr. Kuh, you are a member of Kuh Bros., are you?     A. Yes.

Q. How long have you been in that firm?

A. Since the existence of the firm.

Q. Are you acquainted with the business of play suits, and rompers, [91—73] and Koveralls, and overalls, and things of that kind?     A. Yes.

Q. What kind of goods do you manufacture?

A. We manufacture play suits of all descriptions, we manufacture also ladies' wear.

Q. Where is your factory?

A. We have two factories; we have one now at 500 Howard, and the other is on Sacramento Street.

Q. Are you acquainted with these play suits that form the subject matter of this controversy here?

A. I am.

Q. Were you present at any interview with Macowsky, or Miller & Macowsky, regarding this

(Testimony of Irwin D. Kuh.)

patent matter before they turned it over to Eloesser-Heynemann?     A. I was.

Q. What occurred at that time?

A. We received a letter from Miller & Macowsky, informing us they had secured a patent on this garment, and for us to stop making the garment, so in a few days Mr. Macowsky came over, and we had not been very good friends, the firms had not been, and he said, "Let us get together on this, you stop manufacturing this garment, and sell what you have on your hands, and everything will be all right," which, after talking over with my brother, we agreed to do.

Q. That is, he gave you permission to sell the garments that you had on hand?     A. Absolutely.

Q. Then you agreed to not make any more of these garments; is that a fact?

A. That is absolutely the fact.

Q. Is this the garment which you were then selling, which is marked Exhibit "P"?

A. That is the garment in question.

Q. That, of course, is like the Miller & Macowsky patent, is it not?

A. I should judge the same thing.

Q. About how many of these garments did you have left on hand at the time Eloesser-Heynemann took over the patent?

A. I don't know, between 100 and 150 dozen, I should judge; I am not exactly sure.

Q. Are those the ones that were left on hand after

(Testimony of Irwin D. Kuh.)

your conversation [92—74] with Mr. Macowsky in which he told you you could sell?     A. Yes.

Q. Now, what became of the others?

A. Those garments were laid away, and we took those garments and took the sides off of them and made them a straight leg like the Koverall, and we sold them to a concern in Sacramento.

Q. Please look at these two garments, here, Exhibits 3 and 5, Exhibit 3 being the Kute Kut garment, and Exhibit 5 being the Jim Dandy garment of yours, and point out the differences between these, so as to distinguish one from the other.

A. The Kute Kuts have a square or a Dutch neck; the Jim Dandy has a round neck; the Kute Kut has piping at the end, and the Jim Dandy has a cuff; the Kute Kuts have a band which is supposed to represent a belt, while the Jim Dandy has a yoke both front and back, and has a sort of belt which buttons in the front. The Kute Kut has two patch pockets in front, and the Jim Dandy has the pockets in the side, on the lap known as the peg.

#### Cross-examination.

Mr. ACKER. Q. Did Mr. Eloesser inform your firm that they were the exclusive licensees for Miller & Macowsky under the letters patent in suit prior to acquiring all right, title and interest in and to the patent?

A. I don't know a thing about it if he did.

Q. You have no knowledge of that, one way or the other?     A. No.



(Testimony of Henrietta Loeb.)

Q. You are manufacturing these garments at the present time, are you not?

A. We are manufacturing Exhibit 5.

**Testimony of Henrietta Loeb, for Defendant**

HENRIETTA LOEB, called for the defendant, sworn.

Mr. MILLER. Q. What is your business, Miss Loeb? [93—75]

A. I am buyer for the Emporium, downstairs.

Q. What kind of goods do you have to do with there? A. Infants' wear and muslin underwear.

Q. You mean the Emporium down on Market Street?

A. Market Street, in the downstairs portion.

Q. A very large store, is it not? A. I think so.

Q. What goods do you deal with?

A. I buy the children's dresses, infants' wear, and ladies' muslin underwear.

Q. Have you become pretty well acquainted with the different kinds of play suits that are on the market? A. I think so.

Q. What play suits have you sold there, whose make?

A. Up to three years ago I was the buyer in the upstairs department, and we carried Levi Strauss' Koveralls; three years ago last January I changed positions in the store, and I went downstairs, in January, 1920, and found play suits, Jim Dandies, in the department, and we continued selling them.

(Testimony of Henrietta Loeb.)

Q. What other play suits do you sell besides the Jim Dandy?

A. We do not carry anything else, there were none there; there are a few other models there, different models, that the stock was heavier than the Jim Dandies.

Q. Do you carry any Kute Kuts?

A. We do not, not in our department.

Q. Does the store carry any?

A. Yes, they carry them upstairs on the second floor, in the infants' wear department.

Q. Are you familiar with the Kute Kut?

A. I have seen the samples, yes.

Q. I will show you two garments, one of them Exhibit 3, which is a Kute Kut, and ask you if you have seen that sample?     A. Yes.

Q. And another one, Exhibit No. 5, which is called the Jim Dandy, and ask you if you are familiar with this one also?     A. I am.

Q. Now, as a person acquainted with things of this kind, will [94—76] you please point out for me the differences between these two that would attract your eye?

A. I consider these two garments entirely different, one is a strictly girls' garment, and the other one a boys'.

Q. Point out the differences between the Kute Kut and the Jim Dandy.

A. It has a fullness here.

Q. Which one do you mean?

A. This one here, the Jim Dandy.

(Testimony of Henrietta Loeb.)

Q. What kind of a shaped neck do you find?

A. This is a round neck.

Q. The other one, of course, is a square neck?

A. Yes, what they call a square Dutch neck.

Q. That is called a square Dutch neck?

A. Yes, just a matter of difference of opinion.

Q. What do you find with respect to the pockets of the two, as to difference?

A. This is entirely different, this is the continuation of the yoke.

Q. You mean the Jim Dandy?

A. The Jim Dandy is the continuation, and the pockets are concealed in the fullness at the sides.

Q. Where are the pockets in the other?

A. They are on the outside.

Q. Would these differences make any impression on you, or attract you?

A. Decidedly. It is a better garment for a girl.

Q. The Jim Dandy?

A. Yes, this garment here is a better garment for a girl, and the reason why I think it is different is because it is patented, and I do not see how the United States Patent Office could issue any patent on anything that was not different.

Mr. ACKER.—I object to that.

A. It is just my opinion.

The COURT.—The Court will give it no consideration.

Mr. MILLER. Q. Now, in regard to this Exhibit 3, do you find the waist band here extending up underneath the arm-pits? [95—77]

(Testimony of Henrietta Loeb.)

A. No. This I would consider a little bit lower, and the yoke effect is the continuation of the front; it has the same effect in the back as in the front in regard to the yoke.

Q. Does the yoke have any effect on the appearance? A. Yes, absolutely it does.

Q. How about the cuffs?

A. The cuffs, as well, and has a loose belt.

Q. The belt has a decided effect? A. Exactly.

Q. Do you think you could be deceived into taking one of these garments for the other?

Mr. ACKER.—That question is objected to as calling for an expression of opinion.

The COURT.—Yes.

Mr. MILLER. Q. Nobody could fool you on these two garments, could they?

Mr. ACKER.—The same objection.

The COURT.—Sustained.

Mr. MILLER. Q. Do you know of anyone who has ever been deceived into taking a Jim Dandy for a Kute Kut?

Mr. ACKER.—The question is objected to as immaterial, irrelevant and incompetent.

The COURT.—Sustained.

Mr. MILLER.—That is a fact, if she knows of anyone who has ever been deceived.

The COURT.—It depends upon the appearance, what they are, in fact, as laid before the Court.

Mr. MILLER. Q. Were you down with Mr. Louis Kuh when he designed this Jim Dandy garment? A. Yes.



(Testimony of Henrietta Loeb.)

Q. Just tell us what occurred?

A. Mr. Kuh 'phoned to me one day and said, "Miss Loeb, we are going to make up and bring out a new garment, and I would like to see you in regard to it." So I came down to the office, and he showed me two garments, [96—78] these two garments right here.

Q. You mean the pink garment and the blue garment?

A. Yes, one was a creeper and the other was a boy's wash suit.

Q. Which is the creeper?      A. This one here.

Q. This one marked Exhibit "M" is what you call a creeper?      A. Yes.

Q. And the other one, which is marked Exhibit "O," you call that a boy's wash suit?

A. A boy's wash suit.

Q. Proceed.

A. So he showed me the two garments, and he said he thought he could combine the two, and I said, "That is a very splendid idea, if you do, just change your yoke and make it round and put a belt in front; I suggested that, and the garment was shown me a few days later—a sample was shown me a few days later, and I just suggested making it round here, instead of square, and having the belt come across the front, to make it a decided girls' garment.

(Testimony of Henrietta Loeb.)

Q. The yoke on the pink garment here is square, and you suggested to make it round?

A. Yes, and I think it is not as high as this garment, here.

Q. You did not cut the pattern yourself, did you?

A. No, I think he had them cut.

Cross-examination.

Mr. ACKER.—Q. As I understand, it was your suggestion to Mr. Kuh that he embody the yoke and the belts: Is that correct?     A. Yes.

Q. Did you receive any instructions from your superior at the Emporium not to buy the play suits of Kuh Bros. on the ground that it was near to the patented design play suits owned and controlled by Eloesser-Heynemann, and the firm did not care to get into any litigation?

Mr. MILLER.—Objected to as immaterial, irrelevant and incompetent. [97—79]

The COURT.—I think so.

Mr. MILLER.—That is our case.

**Testimony of Herbert Eloesser, for Plaintiff (Recalled in Rebuttal).**

HERBERT ELOESSER, recalled for plaintiff in rebuttal.

Mr. ACKER.—Q. Mr. Eloesser, you have heard the testimony of Mr. Louis Kuh, with reference to the conversation he held with you regarding play suits, and your offer to take the play suits he had on

(Testimony of Herbert Eloesser.)

hand, purchase them—you remember the testimony?     A. I remember the testimony.

Q. What have you to say with reference to the correctness or incorrectness of the testimony of Mr. Louis Kuh on that point?

A. I differ entirely in my recollection of that occurrence. I do not agree with Mr. Kuh's recollection of it in very many particulars. I was up at Mr. Kuh's place only once, and Mr. Kuh came in to us on several occasions. He came into us the first time in connection with this matter that I am speaking of, and told me that he had received notice from Miller & Macowsky that their garment was patented, and that they were infringing on this patent; he wanted to know whether we did not agree with him that there was no basis for such a notice, and that we had a perfect right to make these things, that nobody had any right to exclude other manufacturers from manufacturing garments of this kind. I explained to him that I could not give him any off-hand answer, and that if Miller & Macowsky had a patent that was valid, that we had no desire to infringe on it, and the only thing I could do was to find out whether they did have such a patent. I explained to him that I would let him know when I had further information. About this time, we were called on by a number of other people who were making similar [98—80] gar-

(Testimony of Herbert Eloesser.)

ments, and I gave them similar answers. I proceeded to get an opinion from Munn & Company.

Mr. MILLER.—I object to that.

Mr. ACKER.—Do not repeat any conversation. What took place at this conversation?

A. That was the conversation that I had with him on that particular occasion. The next conversation that I had was to let Mr. Kuh know that we had made license arrangements with Miller & Macowsky on the strength of the opinion we had received that our garment was an infringement, that this license arrangement gave us the exclusive right on the Pacific Coast to manufacture the goods, and that I believe that he had better dispose of his stock to Miller & Macowsky, because this license arrangement with us also specified that they had to protect their patent.

Q. Mr. Eloesser, what I wish to ascertain is whether or not the agreement or offer you made to Mr. Kuh was to take this garment off his hands, provided he would discontinue the infringing act.

A. I was just coming to that. Then Mr. Kuh told me that they and his firm were at outs, he spoke of the old feeling, and he said, under the circumstances they could have no dealings with Miller & Macowsky, and I think that it would be explained.

The COURT.—Just tell us what was said.



(Testimony of Herbert Eloesser.)

A. I told Mr. Kuh if he was not willing to deal directly with Miller & Macowsky that we would probably be willing to arrange to take these garments off his hands, provided he would agree not to make any more of the same design, and Mr. Kuh refused to make such an agreement, and he gave as a reason for not making such agreement the fact that he was planning to put out another garment, and I said that we would have to hold these whole negotiations for the purchase of his stock in abeyance until we could see what the other garment was going to be. It appeared to me to [99—81] be inconsistent that he should refuse to make an arrangement with us, on the strength of a new garment, if that garment did not infringe. Mr. Kuh said that he was not ready to show that garment, that he had not it in shape, or was not prepared to let me see it, but he expressed his willingness to let me see it when it was ready. I believe that was the end of that conversation. The next conversation took place when Mr. Kuh advised us that this garment was now ready, that he was willing to let me see it. That was the occasion when I called at his place of business and he showed me this sample, and I told him that, in my opinion, it was just as much an infringement of the patent as the other one, and he at that time said that he knew all about patents, and he knew what was an infringement and what was not an infringement.

(Testimony of Herbert Eloesser.)

Q. There have been certain letters patent introduced in evidence here as exhibits on behalf of the defendant, Mr. Eloesser; please examine those letters patent with the letters patent in suit before you and state the differences and similarities you find to exist between them?

A. The first one before me, Mr. Acker, is marked Exhibit J; there is an illustration of a doll; that does not seem to illustrate the garment in any particular; it shows a doll dressed in a two-piece garment with a sort of waistcoat effect, that has lace down in front, and there is a sort of panel-shaped trousers, with apparently the effect of a belt put on at the top, very narrow at the bottom. It don't look as though it would be a practical design of a garment to be used. The proportions are quite different. The small waist on the doll is quite differently proportioned from what our design shows, also down at the hips instead of a short-waisted article.

The next one that I have before me is marked Exhibit I; that seems to be a one-piece garment, with a skirt; it does not seem [100—82] to have any type of legs at all, it is quite different; I think the fact that it has a skirt and hasn't any legs to it would make it so different that we need consider it no further. The next Exhibit is marked H; this is the style of romper that was put on the market by Patsy, it has not any legs, it has openings for the feet to go through, with a cuff effect. It is not a play suit or a long-legged affair, in any sense of the word. Exhibit "G" partakes of the same general

(Testimony of Herbert Eloesser.)

description as Exhibit "H," except that it has a little different ornamentation on it. Exhibit "F" is a boy's style play suit, which was the only available type of play suits on the market at the time that our design was introduced. It is a straight garment, with a very low waist, and has none of the appearances of the peg-top style with the high waist and other features of our design.

Q. What have you to say with reference to Defendant's Exhibit "A"?

A. Defendant's Exhibit "A," as I see it, has a large bloomer-like back, so to speak, with openings at the bottom, with a little cuff, and has not anything that I would consider to be legs there. It is a two-piece article, the upper half or upper portion entirely separate from the bottom portion. It has no appearance of any pocket at all.

Q. What have you to say with reference to the publication introduced in evidence and known as the Dutch Twins?

A. This is a picture of a child dressed in a two-piece suit, apparently the lower part being trousers of the bloomer style, and in no respect a peg-top garment; they seem to be nearly as big at the bottom as at the top, and they seem to be bound in to the ankles with a tape or elastic of some kind; it has not any resemblance, in my opinion, to a peg-top garment. The upper part seems to be a separate waistcoat, it seems to be put on over a shirt, and there seems to be short sleeves up there.

(Testimony of Herbert Eloesser.)

Cross-examination.

Mr. MILLER.—Q. Referring to the Davis patent, Exhibit “F,” that you have there, is it not a fact that the only difference between your design and his design is that Davis has straight legs and you have peg-top legs?

A. No, that is not the only difference.

Q. What other difference is there?

A. His garment is a low-waisted garment; our waist comes very much higher than his garment.

Q. If you were to change these straight legs into peg-topped, just as I have indicated in pencil, there, then do you think that would be the same thing as yours?

A. I should say that the short waist effect would be lacking.

Q. Anything else?

A. Nothing else occurs to me at the moment.

Q. So that if you were to shove that waist or belt up underneath the arms and change the straight legs to peg tops, that would be the same?

A. If you changed their design to our design it would be the same.

Q. If I would make this change in their design it would be the same as your design?

A. Yes, it would be similar to our design.

Q. Is there any difference between your patent and the Zidell patent, other than the fact that long legs have been attached to a design of that kind?

A. I think long legs attached to that would not make anything like ours.



(Testimony of Herbert Eloesser.)

Q. If I were to draw the legs down in that way, it would be the same thing as yours, practically, wouldn't it?

A. No, it would look entirely different.

Q. You have the same square Dutch neck?

A. No.

Q. What is the difference between yours?

A. This seems to be cut down into the bodice at the front and back.

Q. Look at the other one, Exhibit "H"; you have the same square Dutch neck?

A. Not the same as that. [102—84]

Q. What is the difference?

A. That one is also cut much deeper than ours. That is a very extreme Dutch neck, and our comes much higher.

Q. Do you claim anything from the fact that your Dutch neck is shallow rather than deep?

A. Only a part of the design.

Q. This Exhibit "G" also has a short sleeve, hasn't it?     A. Yes.

Q. Any difference between this and this?

A. They are somewhat differently shaped, but it is not a serious difference in itself.

Q. Defendant's Exhibit "G" also has a belt or waist effect up underneath the arm-pits, the same as yours, hasn't it?

A. I don't quite understand your question.

Q. This Exhibit "G" also has a belt with buttons on it?     A. Yes.

Q. Arranged underneath or near to the arm-pits?

(Testimony of Herbert Eloesser.)

A. Yes.

Q. Is there any difference between that and this?

A. No.

Q. Defendant's Exhibit "G" also has the flaring points on the hips, has it not?

A. I should say that it had not on the hips. It is quite differently arranged.

Q. It has a flare effect on the sides, has it not?

A. It has a flare effect on the sides, yes.

Q. Is there any difference between that flare and the flare in your design? A. I think there is.

Q. Then, according to that, your patent must be construed by these little details or differences which you have mentioned a few moments ago, the difference of the low neck, and the legs, and so on?

A. I have to qualify that in my answer. I cannot say that they are little differences.

Q. The differences which you have specified in your examination? A. Yes, large differences.

Q. And those differences which you have specified in your examination are the differences between your patent or your design and the others?

A. They are the principal differences. [103—85]

Q. Are there any other differences? If so, you have an opportunity now to tell us what other differences there are.

A. I would have to examine them more closely. If you will let me have the design in my hands I will do it.

Testimony closed.

It is hereby stipulated and agreed that the foregoing is a full, true and correct copy of the testimony given in the foregoing case; it is further stipulated that the same may take the place of the statement of the evidence on appeal provided for by Rule 75 of Equity Rules.

N. A. ACKER,

Attorney for Plaintiff.

JOHN H. MILLER,

Attorney for Defendant.

Dated August 18th, 1923.

[Endorsed]: Filed August 21, 1923. Walter B. Maling, Clerk. [104—86]

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(Title of Court and Cause.)

**Petition for Order Allowing Appeal.**

Eloesser-Heynemann Co., complainant in the above-entitled cause, conceiving itself aggrieved by the final order or decree filed and entered on the 23 day of April, 1923, in the above-entitled cause, whereby it was ordered, adjudged and decreed that the complainant's bill of complaint in said cause be dismissed with costs to the defendant, now comes, by N. A. Acker, Esq., it's solicitor and counsel, and petitions this Court for an order allowing it, Eloesser-Heynemann Co., to prosecute an appeal from said final order or decree to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided;

and also that an order be made fixing the amount of security which complainant, Eloesser-Heynemann Co., shall give and furnish upon such appeal, and that upon giving such security, all further proceedings in this Court be suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated April 27th, 1923, San Francisco, Cal.

N. A. ACKER,

Solicitor for Complainant.

[Endorsed]: Filed Apr. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[105]

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(Title of Court and Cause.)

### **Assignment of Errors.**

Comes now complainant and specifies and assigns the following as errors upon which it will rely upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order or decree of the District Court for the Southern Division of the Northern District of California, Second Division, dismissing complainant's bill of complaint, which order or decree was made and entered on the 23 day of April, 1923.

1. That said District Court for the Southern Division of the Northern District of California, Second Division erred in dismissing said bill of complaint.



2. That the said District Court for the Southern Division of the Northern District of California, Second Division, erred in not ordering or decreeing that complainant's Design Letters #56,450 in suit were void by reason of anticipation and prior publication.

3. That the said District Court for the Southern Division of the Northern District of California, Second Division, erred in not ordering or decreeing that said Design Letters Patent #56,450 were valid letters patent.

4. That the said District Court for the Southern Division of the Northern District of California, Second Division, erred in not ordering or decreeing to complainant the relief prayed for, in and by its said bill of complaint.

5. That the said District Court for the Southern Division of the Northern District of California, Second Division, after finding that the defendant's garment in entirety is plaintiff's in appearance and impression, erred in not finding infringement of the letters patent in suit.

6. That the said District Court for the Southern Division of the Northern District of California, Second Division, erred in holding the garment of Design Letters Patent #56,450, to be none other than the Hollandese Boy's Costume from time immemorial known everywhere for use in original or modified form from [106] paintings, engravings, illustrations and literature.

7. That the said District Court for the Southern Division of the Northern District of California,

Second Division, after expressing no doubt as to the oddity, quaintness and simple artistic merit of plaintiff's design, the utility thereof, attractiveness, popularity and wide use of the garment of Design Letters Patent #56,450, erred in not finding invention disclosed thereby.

8. That the said District Court for the Southern Division of the Northern District of California, Second Division, erred in holding that as between plaintiff's design garment and the illustrations contained in defendant's exhibit publication entitled "The Dutch Twins," there was no substantial difference.

9. That the said District Court for the Southern Division of the Northern District of California, Second Division, erred in holding that in appearance and impression the garment of the design letters patent in suit and the design of garment illustrated in defendant's publication exhibit entitled "The Dutch Twins" presented one and the same design, of which either patented, the other would anticipate or infringe.

In order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the laws and the statutes of the United States in such cases made and provided.

All of which is respectfully submitted.

N. A. ACKER,  
Solicitor for Appellant.

[Endorsed]: Filed Apr. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[107]

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(Title of Court and Cause.)

**Order Allowing Appeal.**

On motion of N. A. Acker, Esq., solicitor and counsel for Eloesser-Heynemann Co., the complainant in the above-entitled cause, it is Ordered that an appeal to the United States *District* Circuit Court of Appeals for the Ninth Circuit from the final Order or Decree filed and entered herein, to wit, on the 23 day of April, 1923, be, and the same is hereby allowed, and that a transcript of the record, testimony, exhibits and all proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit, upon said complainant, Eloesser-Heynemann Co., giving a bond in the sum of 300 dollars.

BOURQUIN,

J.

[Endorsed]: Filed Apr. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[108]

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(Title of Court and Cause.)

**Order Directing Transmission of Exhibits to Circuit Court of Appeals.**

Good cause appearing therefor, on motion of N. A. Acker, Esq., of counsel for complainant, it is or-

dered that all exhibits introduced on behalf of the complainant and on behalf of the defendant shall be withdrawn and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, to be used upon the hearing of the appeal in said Court.

BOURQUIN,  
District Judge.

Dated Apr. 27, 1923, at San Francisco, Cal.

[Endorsed]: Filed Apr. 27, 1923. Walter B. Mal-  
ing, Clerk. [109]

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Premium charged for this bond is \$10.00 per an-  
num.

AMERICAN SURETY COMPANY .  
OF NEW YORK.

(Title of Court and Cause.)

**Bond on Appeal.**

That we, Eloesser-Heynemann Co., appellant herein, a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the city and county of San Francisco in said State, as principal, and the American Surety Company, of New York, a corporation organized under the laws of the State of New York and duly authorized to transact business in the State of California as surety are held and firmly bound unto the above-named appellee, Kuh Bros., in the sum of Three Hundred Dollars, lawful money of the United States of America, to be paid to the said appellee,



its successors, and legal representatives, to which payment, well and truly to be made we bind ourselves and our heirs, executors, administrators and successors jointly and severally, firmly by these presents.

Dated this 28th day of May, 1923.

The condition of the above obligation is such that whereas the appellant Eloesser-Heynemann Co., has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a final order or decree rendered and entered by the District Court of the United States, Ninth Judicial District, in and for the Northern District of California, Second Division, in the case entitled Eloesser-Heynemann Co., vs. Kuh Bros., In Equity #615, which said final order or decree was rendered and entered in the said District Court on the 23 day of April, 1923, being a day in the March term of said District Court.

Now, therefore, if the above-named appellant shall prosecute [110] said appeal to effect, and answer or damages and costs, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

[Seal] ELOESSER-HEYNEMANN CO.

By H. ELOESSER,  
1st Vice-president.

AMERICAN SURETY COMPANY OF  
NEW YORK, [Seal]

By M. A. BAILEY,  
Resident Vice-president.

Attest: E. C. MILLER,  
Resident Assistant Secretary.

State of California,

City and County of San Francisco,—ss.

On this 28th day of May in the year one thousand nine hundred and twenty-three before me, John McCallan, a notary public in and for said city and county, State aforesaid, residing therein, duly commissioned and sworn, personally appeared M. A. Bailey and E. C. Miller known to me to be the resident vice-president and resident assistant secretary respectively of the American Surety Company of New York the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said city and county of San Francisco, the day and year in this certificate first above written.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires April 12th, 1925.

Approved:

M. T. DOOLING,

Judge.

[Endorsed]: Filed Jun. 8, 1923. Walter B. Mal-  
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.

[111]

(Title of Court and Cause.)

**Praeceptum for Transcript on Appeal.**

To the Clerk of Said Court:

Sir:

Please issue citation for appeal and prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit the following as transcript on appeal.

Bill of complaint;

Defendant's answer and amendment thereto;

Copy of testimony on file herein;

Petition for order allowing appeal;

Assignment of errors;

Order allowing appeal;

Bond on appeal;

Order for withdrawal of exhibits;

Opinion of Court.

N. A. ACKER,

Attorney for Plaintiff.

[Endorsed]: Filed Aug. 21, 1923. Walter B Maling, Clerk. [112]

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(Title of Court and Cause.)

**Certificate of Clerk U. S. District Court to Transcript of Record**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing

one hundred twelve (112) pages, numbered from 1 to 112, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$51.00; that said amount was paid by the plaintiff, and that the original citation issued in said cause is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of September, A. D. 1923.

[Seal]                      WALTER B. MALING,  
Clerk United States District Court for the Northern  
District of California. [113]

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### **Citation on Appeal.**

United States of America,—ss.

The President of the United States, to Kuh Bros., a corporation, located and doing business at 15 Battery Street, City and County of San Francisco, State of California, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an



order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein Eloesser-Heynemann Co is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PART-  
RIDGE, United States District Judge for the  
Northern District of California, Southern Division,  
this 24th day of August, A. D. 1923.

JOHN S. PARTRIDGE,  
United States District Judge.

**(Marshal's Return.)**

United States of America,  
Northern District of California,—ss 615.

I HEREBY CERTIFY AND RETURN that I served the annexed citation on appeal, on the therein-named, Kuh Bros., a corporation, by handing to and leaving a true and correct copy thereof with Louis Kuh (President of Kuh Bros., a corporation), personally at the City and County of San Francisco, in said District, on the 25th day of August, 1923.

San Francisco, Cal., August 25th, 1923.

J. B. HOLOHAN,  
United States Marshal,  
By I. W. Grover,  
Deputy.

[Endorsed]: M. D. 9917. No. 615. United States District Court for the Northern District of California, Eloesser-Heynemann Co. (a corporation) Appellant, vs. Kuh Bros. (a corporation), Appellee. Citation on Appeal. Filed Aug. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [114]

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[Endorsed]: No. 4105. United States Circuit Court of Appeals for the Ninth Circuit. Eloesser-Heynemann Company, a Corporation, Appellant, vs. Kuh Bros., a Corporation, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed September 11, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

No. 4105.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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ELOESSER-HEYNEMANN COMPANY,  
a Corporation,

*Appellant,*

VS.

KUH BROS., a Corporation,

*Appellee.*

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**BRIEF ON BEHALF OF PLAINTIFF-APPELLANT**

---

NICHOLAS A. ACKER,  
*Solicitor and Counsel for Appellant.*

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**FILED**

**FEB 1 8 1924**

**W. H. HARRINGTON,**  
CLERK





No. 4105.

IN THE

**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT.**

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ELOESSER-HEYNE MANN COMPANY,  
a Corporation,

*Appellant,*

VS.

KUH BROS., a Corporation,

*Appellee.*

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**BRIEF ON BEHALF OF PLAINTIFF-APPELLANT**

The present case comes before this Honorable Court on appeal from the final order and decision of the United States District Court for the Northern District of California, Second Division, filed and entered on the 7th day of April, 1923, adjudging the Letters Patent No. 56,450 in suit to be invalid.

The letters patent in suit were issued under date of Oct. 26th, 1920, to J. Miller and D. Macowsky on application filed May 7, 1917, for a design invention relating to what is known as child's rompers.

The Bill of Complaint is in the ordinary form in equity charging infringement of the design letters patent, praying for an injunction, and for an accounting.

By its answer the defendant below—appellee herein—challenged the validity of the design letters patent in suit and denied infringement. The case was tried in open court before District Judge George M. Bourquin, after which the court rendered and filed its opinion (Record pp. 18-21), adjudging the letters patent invalid on the ground of anticipation, and ordered a dismissal of the suit.

The assignment of errors (Record pp. 134-136), although nine in number, resolve themselves to two general errors, viz.:

(a) Error in holding invalidity of the letters patent in suit;

(b) Error in holding non-infringement.

Before giving consideration to the merits of the present appeal we desire to direct the Court's attention to two typographical errors occurring in the printed record. The first relates to the second assignment of errors (Record p. 135), wherein the word "not" appears in the third line of the assignment of errors and before the word "ordering". This word should be canceled. Our copy of the assignment of errors as filed with the lower court does not disclose this word, and the appearance thereof in the printed record is evidently a typographical error.

The second error, probably an immaterial one, is in connection with witness Garfinkel appearing as a witness on behalf of the "plaintiff" (Record p. 71). Witness Garfinkel appeared on behalf of defendant, not for the plaintiff.

## STATEMENT OF FACTS.

Briefly stated the facts of the present case are as follows:

Plaintiff-appellant and defendant-appellee are each located and doing business in the City and County of San Francisco, as manufacturers of garments, and plaintiff-appellant is owner by due assignment of all right, title and interest in and to United States Letters Patent No. 56,450 granted Miller and Macowsky under date of October 26th, 1920, on application filed in the United States Patent Office under date of May 7th, 1919.

Prior to obtaining patent protection by letters patent for the design invention herein involved, and within a period of less than two years before the filing of their application for letters patent thereon, the patentees, Miller and Macowsky, as manufacturers of children's garments, then located and doing business in the City and County of San Francisco, California, commenced the manufacture of the design garment of the letters patent involved herein. After the manufacture of such garment, one H. Garfinkle, a manufacturer of children's clothing, also located in San Francisco, California, doing business under the trade name "California Art Works", obtained one of the design garments manufactured by Miller and Macowsky. This garment the said Garfinkle copied and proceeded with the manufacture and sale of the same to the trade. On notice from Miller and Macowsky that the garment was a design invention for which they had then pending an application for letters patent thereon, the

said Garfinkle recognized the just claim of the inventors Miller and Macowsky and discontinued the manufacture and sale of said garment.

Shortly after the manufacture and sale by H. Garfinkle of the design garment invention in suit, Eloesser-Heynemann Company, plaintiff-appellant, also Kuh Brothers, defendant-appellee herein, commenced the manufacture and sale to the trade of the said garment. After issuance of the letters patent in suit each party was duly and promptly notified by the patentees, Miller and Macowsky, that the play suit garment being manufactured and sold by their houses constituted an infringement of the design invention one-piece play suit covered by Design Letters Patent No. 56,450 involved herein. As a result of such notification as to infringement, Eloesser-Heynemann Company, recognizing the justice as to the claim of Miller and Macowsky, took a license from the said patentees under a royalty agreement and continued with the manufacture and sale of such garments. This license at a subsequent period ripened into an assignment of the letters patent and the invention covered thereby unto said company, so that Eloesser-Heynemann Company acquired all right, title and interest in and to said letters patent and the invention covered thereby. Kuh Brothers, defendant-appellee, while not taking a written license from the patentees, Miller and Macowsky, entered into an agreement with said patentees to discontinue the manufacture and sale of its alleged infringing garment provided permission was given to dispose of the stock of the alleged infringing garments then on hand. Such permission was granted by the



patentees, Miller and Macowsky. However, Kuh Brothers did not keep faith with the patentees, but immediately on the disposal of the stock of the alleged infringing garments then on hand proceeded to place upon the market a second garment, in all respects, so far as relates to configuration, ornamentation, outline and appearance, substantially the same as their first manufactured and sold garment, and as to which they agreed to discontinue the manufacture thereof provided permission was granted to them to dispose of the stock then on hand.

The second garment manufactured by Kuh Brothers for sale to take the place of its first claimed infringing garment was disclosed by said Kuh Brothers to Mr. Eloesser, one of the members of the Eloesser-Heynemann Company, and after an examination thereof he, the said Eloesser, at once notified Kuh Brothers that, in his opinion, the said second garment was as much an infringement of the design letters patent involved herein as the first garment.

After Eloesser-Heynemann Company, plaintiff-appellant, acquired title to the letters patent in suit, various manufacturers of play suit garments located in San Francisco, California, commenced the manufacture and sale of one-piece play suits of substantially the same character as the invention of the design letters patent in suit. These manufacturers on notification as to infringement, gave recognition to the letters patent in suit and discontinued the manufacture of the claimed infringing garments, so that at the time of the commencement of the present action for infringe-

ment Kuh Brothers, defendant-appellee, constituted the only manufacturer refusing to discontinue the claimed infringing act.

Suit for infringement was instituted on the 17th day of May, 1921, but owing to the congested condition of the lower court relative to trial of cases pending, final hearing was not obtained until late in the month of March, 1923.

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### STATEMENT OF INVENTION.

The letters patent in suit, No. 56,450, appear as Plaintiff's Exhibit 1.

The letters patent were duly transferred by an assignment in writing unto Eloesser-Heynemann Co., plaintiff-appellant, and the assignment appears as Plaintiff's Exhibit 2.

For convenience of the Court the letters patent are here produced in full:



DESIGN.

J. MILLER AND D. MACOWSKY.

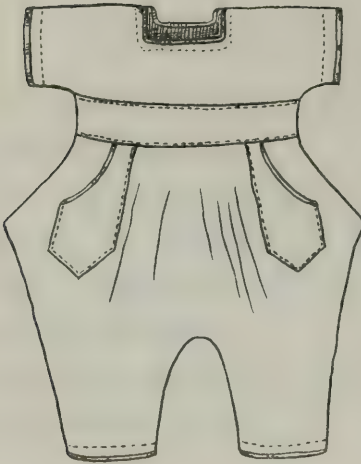
CHILD'S ROMPER.

APPLICATION FILED MAY 7, 1919.

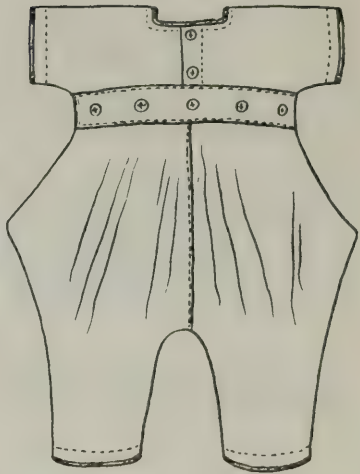
56,450.

Patented Oct. 26, 1920.

*Fig. 1.*



*Fig. 2.*



INVENTORS

*Julius Miller*  
*David Macowsky*

BY

*Strong & Townsend*  
ATTORNEYS



# UNITED STATES PATENT OFFICE.

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JULIUS MILLER AND DAVID MACOWSKY, OF  
SAN FRANCISCO, CALIFORNIA.

DESIGN FOR A CHILD'S ROMPER.

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56,450.

Patented Oct. 26, 1920.

Specification for Design.

Application filed May 7, 1919. Serial No. 295,489. Term of patent  
14 years.

*To all whom it may concern:*

Be it known that we, JULIUS MILLER and DAVID MACOWSKY, citizens of the United States, residing at the city and county of San Francisco and State of California, have invented a new, original, and ornamental Design for Children's Rompers, of which the following is a specification, reference being had to the accompanying drawing, forming part thereof.

Figure 1 is a view in front eleva-

tion of a child's romper showing our new design.

Fig. 2 is a view in rear elevation of the same.

We claim:

The ornamental design for a child's romper, as shown.

JULIUS MILLER.  
DAVID MACOWSKY.

Witnesses:

W. W. HEALEY,  
G. M. BALL.



As will be noted from an examination of the letters patent, the specification discloses a design for child's romper or play suit, and the same is illustrated in two views by the drawings, Fig. 1 being a front view of the child's romper or play suit and Fig. 2 a rear view of the garment. The invention is readily visualized by reference to the drawings illustrative thereof. The claim is in the usual form covering design inventions, being expressed "*The ornamental design for a child's romper, as shown.*" When reference is had to the two views of the drawings forming a part of Design Letters Patent No. 56,450, it is apparent that the design invention is pictured in general outline as a garment of a horizontal line from the end of one short sleeve across the shoulders to the end of the other, and notched or cut away intermediate to form what is disclosed in the illustration as a square neck opening. A belt feature is arranged below the arm pits which may or may not be of a detachable character, and when viewed from the rear there is disclosed associated with the belt feature, buttons. The waist of the garment, which constitutes a continuation and a permanent portion of the trouser portion of the romper or play suit, is such as to give a short-waisted line appearance, while the trouser section of the garment is of an outline to produce what has been termed in the present case "pegged" top long trousers. There are buttons at the back of the waist and belt of the garment, and ornamentation relative to the neck opening and sleeves.

It will be noted that the Design Letters Patent No. 56,450 is for a one-piece romper or play suit, the expression one-piece being employed in contradistinc-

tion to play suits or rompers composed of upper and lower separable parts. The first garment manufactured and sold by defendant-appellee appears in the record as Plaintiff's Ex. 4 and the garment now being manufactured and sold by the defendant-appellee appears as Plaintiff's Ex. 5, while the garment manufactured and sold by the plaintiff-appellant appears as Ex. 3.

Comparing Plaintiff's Ex. 4, the first garment manufactured and sold by the defendant-appellee, with the invention disclosed by the specification and drawings of the Design Letters Patent No. 56,450, it will be observed that said garment in all its details conforms strictly to the invention as illustrated, described and covered by said Design Letters Patent No. 56,450. An examination of Plaintiff's Ex. 5, comparison thereof with the invention of Design Letters Patent No. 56,450, discloses every element of the design letters patent to be embodied in said Ex. 5.

The lower court in its decision gave to the invention of the design letters patent in suit all of the attributes necessary to sustain a design invention, stating that there was

"no doubt of the oddity, quaintness and simple artistic merit of plaintiff's design, nor of the utility (sometimes of account even in design patents), attractiveness, popularity and wide use of its garments."

No higher tribute in support of design invention is possible than that given by the lower court to the design invention in suit as above expressed, being further advised by the lower court that



“Defendant’s garment in entirety is plaintiff’s in appearance and impression”,

and if the court had not found, as it did, want of invention, a decision of infringement of said Design Letters Patent No. 56,450 must of necessity have followed.

The action in the lower court was commenced under Section 4929 of the Revised Statutes, as amended, and which reads as follows:

“Any person who has invented any new, original and ornamental design for an article of manufacture, not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than two years prior to his application and not in public use or on sale in this country for more than two years prior to his application unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, the same as in cases of inventions or discoveries covered by Sec. 4886, obtain a patent therefor.”

We have pointed out as to the finding of the lower court relative to oddity, quaintness, artistic merit, utility, attractiveness, popularity and wide use of garments manufactured and sold by the plaintiff-appellant under the design letters patent in suit, and equally so have called attention to the finding of the court as to the defendant-appellee’s garment in its entirety as to appearance and impression being that of the plaintiff’s design garment, and it only remains whether or not the patentees of Design Letters Patent No.

56,450 invented a new, original and ornamental design for an article of manufacture. It is hardly necessary to go into the question as to whether or not such a garment was "known or used by others in this country" before their discovery, for the record in this case is absolutely silent as to such a design garment ever having been known or used by others in this country prior to the invention thereof by the patentees of Design Letters Patent No. 56,450, nor is there any evidence contained in this record as to any such garment having been "in public use or on sale in this country for more than two years prior" to applicants' application for the design letters patent in suit, and, equally so, it has not been proven under the record in this case that the said invention had "been abandoned". The sole question as we view it in connection with the present appeal is whether or not the invention of the letters patent in suit has been anticipated and by reason thereof the letters patent invalid. Want of invention does not enter into the present case except in so far as want of invention is negated by prior publications. There is not and cannot be, in view of the decisions to which we shall later direct attention, any question as to a child's romper or play suit constituting an article of manufacture under and within which the meaning of Section 4929 of the Revised Statutes, for such question has been decided affirmatively by this court.

### ALLEGED ANTICIPATION.

There is no general rule applicable to the question of anticipation, for it is about as difficult to state a

general rule of anticipation as it is to define invention. The difficulty with all general rules, or attempts at general rules, is that when we come to apply them to a specific case there are so many variations from the supposed condition upon which the general rule is predicated that application is difficult, if not impossible. There is no question, however, that in order to establish anticipation, that which is alleged to anticipate must show or disclose the invention at issue to such an extent as to enable one to produce from the alleged anticipatory matter and by following the lines and disclosure thereof that which it seeks to anticipate. Where the matter sought to be anticipated relates to a design, such anticipatory matter must disclose the design in its entirety. In applying the rule of anticipation to the design invention at issue we are not permitted to take one feature or element of the design from one prior publication or patent, another element from another and a third from still another and from the three or more prior patents or publications build up or construct an anticipation of the design invention. The design as a whole must be present in some one of the alleged anticipatory publications or prior patents, for the single claim contained in the letters patent at issue is the full equivalent of a combination claim under a mechanical patent. No claim is made that any one element of the design invention constitutes the sole novelty thereof and being for a combination it is presumed that each and every element which goes to make up the design invention as a whole is old in the art. The present invention re-

sides in the combining of these various old elements or features into a unitary or single design.

In support of the defense of anticipation the defendant-appellee herein introduced in evidence the following publications and prior issued letters patent:

Publication entitled "The Dutch Twins," copyrighted in 1911, Defendant's Ex. "E";

United States Design Letters Patent No. 51,674, granted Jan. 8, 1918, to Simon E. Davis, Defendant's Ex. "F";

United States Design Letters Patent No. 52,720 of Nov. 19, 1918, issued to Wm. I. Zidell, Defendant's Ex. "G";

United States Design Letters Patent No. 54,809, granted March 23, 1920, to Wm. I. Zidell, Defendant's Ex. "H";

United States Design Letters Patent No. 1,255,491, issued to Mary T. Verde, Defendant's Ex. "I";

United States Design Letters Patent No. 47,337, granted June 15, 1915, to G. Averill, entitled "Design for Doll," Defendant's Ex. "J".

Each of these letters patent was testified to by plaintiff's witness, Herbert Eloesser, and in his testimony the witness very fully pointed out wherein the inventions of the said publication and letters patent failed to disclose the design invention of the letters patent in suit, the testimony of the witness appearing between pages 128 and 129 of the record. However, analyzing these references a little more closely than was done by witness Eloesser, we will first give consideration to Ex. "E", the same being a publication entitled "The Dutch Twins". This publication does not disclose, by illustrations or otherwise, a one-piece romper or play suit, the garment portrayed by the illustrations appear-



ing in the publication disclosing a typical Dutch clothing outfit for a child, and which consist of three distinct and separable elements, viz., trousers, a shirt, and a waistcoat which is put on over the shirt. The trousers are of the type known as bloomer or balloon trousers, being exceedingly full, and the bottom of the leg sections bound to the ankle of the wearer by tape or elastic. This is more clearly shown on the first, second and fifth unnumbered pages of the publication and in connection with the picture illustrations opposite pages 11, 14, on page 20, opposite page 30, on pages 32, 44, opposite pages 52, 57, 60, on pages 71, 75, 77, opposite page 87, on page 127, opposite page 139, and on page 147 of the said publication. The trouser element is not shaped or designed to conform to the design outline of the trouser section of the one-piece design garment of the letters patent in suit and which element of the design letters patent comprises a long-legged, open bottomed trouser of pegged-top style. Under the design of the letters patent in suit, the trouser element constitutes an integral portion of the waist of the one-piece child romper or play suit, whereas in the Dutch Twins publication, the illustration of the clothing applied to the child, the waist and trousers represent separable elements. The waist of the suit illustrated in the book "The Dutch Twins" (Ex. "E") has not the shape or appearance of the waist element of the one-piece design invention of the letters patent involved herein. The illustrations of the said publication to which attention has been directed merely disclose that the trousers are buttoned to a waist fitted over the child and there is

not in the plaintiff's design invention that loose, full balloon appearance present in the cuts appearing in the publication. No one could possibly mistake the clothing appearing in connection with the illustration of the said publication and as applied to a boy, for the design garment of the letters patent in the suit. There is not that similarity of appearance which would deceive an ordinary purchaser in accepting one garment under the belief that he was securing the other garment. In other words, the test of infringement of design letters patent does not apply as between the pictorial displays of the said publication and the one-piece design garment of the letters patent under consideration. We do not believe it can be said as between the one-piece play suit design invention of said letters patent and the garment display of the publication, that an ordinary observer, giving such attention as a purchaser usually gives, would be induced to purchase one, supposing it to be the other. If this be true, then there can be no anticipation of the design invention of the letters patent by reason of the earlier publication, defendant's Ex. "E". As stated, the illustrations contained in the said publication are those of the typical dress of the Hollandese, and which, as we know, is entirely different in appearance and general arrangement from the type of garment worn by the American child.

The lower court held the letters patent in suit to be anticipated on the ground that

"Plaintiff's garment is none other than the Hollandese boy's costume from time immemorial known everywhere from use in original or modi-

fied forms, from paintings, engravings, illustrations and literature, to an extent warranting judicial notice."

We have not before us the Hollandese boy's costume which the Court had in mind, nor have we before us the paintings, engravings, illustrations and literature to which the Court referred in its decision. We must assume, however, that what the Court had in mind when making reference to the Hollandese boy's costume comprised costumes of the type represented by the picture illustrations to which we have directed attention relative to "The Dutch Twins" publication, (Defendant's Ex. "E"), for in his decision the Judge states that if he is not warranted in taking judicial notice of the matter mentioned, then it was only necessary to advert to defendant's evidence, viz:

"illustrations in Perkins' 'The Dutch Twins', published not later than 1915 by 'The Riverside Press', and various garments and designs of date not later, especially Averill's Design Patent No. 47,447."

We submit that the publication "The Dutch Twins", Def. Ex. "E", does not disclose the one-piece play garment design of the letters patent in suit.

"The Dutch Twins" publication does not disclose a one-piece design play suit, but clearly illustrates three separate elements of clothing. It does not disclose by illustration the pegged shaped trousers corresponding to the trousers section of the one-piece play suit design of the letters patent in suit. On the contrary, the illustrations of the Dutch Twin publication disclose, as above stated, garments comprising three distinct

and separate elements, one element being the trousers portion of the full-cut bloomer type drawn in at the ankles, but without peg shape; an independent sleeveless body closed down the front instead of closed down the back, and a separate shirt worn under the bodice having sleeves extending through the sleeve-holes of the bodice. In every respect the illustrations of this publication disclose garments entirely foreign to the one-piece design garment of the letters patent in suit.

Judge Bourquin in his decision expresses the opinion that two garments are the same, if when *draped upon the person of a wearer* they are substantially alike in appearance, and that in such case they are of like design, however they may vary in pattern, details of curvature, and angularity. We submit that it is not a question whether two garments may be draped upon the person of a wearer to give or produce a given appearance, but the true test is whether two such garments placed side by side present the same appearance to the eye of an ordinary observer, when giving such attention as a purchaser usually gives, and even then the resemblance between the two garments when thus viewed by an ordinary observer must be such as would induce him to purchase one supposing it to be the other. To a purchaser, the comparison is made between the garments themselves as they appear in the show windows and on the counters of stores and not as to how the garments may be draped upon the person of a wearer. The three-piece garment disclosed in the illustrations of defendant's Ex. "E" "The Dutch Twins" may possibly be so arranged and draped upon the person of the wearer as to give the appearance



of the design garment of the letters patent in suit when applied to the person of the wearer, but if such draping and arrangement be possible for the three-piece garment illustrations of "The Dutch Twins" publication to approximate in appearance the design of the one-piece garment of the letters patent in suit, such could not properly be held or construed to be an anticipation of the patented design invention. It would be more in the nature of an attempt to anticipate by building up piece meal from the prior art an anticipatory structure. An ordinary purchaser exercising ordinary and reasonable care would not be led into purchasing a three-piece garment like the ones illustrated in defendant's publication Ex. "E", believing he was purchasing the design garment of the letters patent in suit. The two garments are absolutely different in appearance and unquestionably this publication was well known to the Examiners in the Patent Office when granting the letters patent in suit and, the issuance of the letters patent is *prima facie* evidence as to novelty and invention over the pictures of the said publication. For instance, examining the picture opposite page 30 of the publication, we are given a rear view of the Dutch costume. Comparing this illustration with the rear view illustration of the design garment of the letters patent, Fig. 2 of the drawings, we find a total absence of the design of said letters patent present in the illustration of the publication. In fact, this dissimilarity is marked not only as to the drawn-in appearance of the trousers at the bottom over the open-bottomed ends of the trousers section of plaintiff's one-

piece design garment, but equally so as to the entire dissimilarity regarding the back of the waist and the belt effect of the design garment of the letters patent. In seeking to anticipate the design invention of the letters patent in suit, that which is offered in anticipation must disclose the design invention in its entirety. Such is not the case with the pictorial illustration of "The Dutch Twins."

Defendant's Ex. "F", Design Patent No. 51,674 illustrates a garment so foreign in appearance, configuration and general outline to the design one-piece garment invention of the letters patent in suit as to hardly justify comment. Certainly no ordinary observer, giving such attention as a purchaser usually gives, would be deceived into buying a garment conforming to Design Letters Patent No. 51,674, Defendant's Ex. "F", under the belief that he was purchasing the one-piece garment of the design letters patent in suit. There is no resemblance between the two design garments and certainly the manufacture and sale of the design garment of Letters Patent No. 51,674 would not constitute an infringement of the design garment of Letters Patent No. 56,450 in suit. As well stated by witness Eloesser (Record p. 129):

"Exhibit 'F' is a boy's style play suit, which was the only available type of play suit on the market at the time our design was introduced. It is a straight garment with a very low waist and has none of the appearance of the peg top style and high waist and other features of our design. I cannot imagine a design more foreign to the design of the letters patent in suit than the one set forth and illustrated by Design Letters Patent # 51,674, Defendant's Ex. 'F'."

Defendant's Ex. "H", Design Letters Patent No. 54,809 is a garment designed for very small children ranging in age from eighteen months to approximately two and one-half years, being more of the creeper type garment. The only possible similarity between the said design garment and the design invention of the letters patent in suit may be said to reside in the upper portion of each garment wherein is disclosed the horizontal line effect incident to the end of one short sleeve to the other. The bottom and waist elements of the two garments are entirely dissimilar. In fact, the one-piece play garment of the letters patent in suit bears no resemblance to the design garment of Letters Patent No. 54,809. At best, said patent No. 54,809 can only be termed a short-legged, romper or creeper garment in contradistinction to the long-legged one-piece design garment of the letters patent in suit. No one could possibly be misled into purchasing a garment conforming to Design Letters Patent No. 54,809 under the belief that he was purchasing the design garment of the letters patent in suit. There is not that resemblance between the two garments as would deceive an ordinary observer and such an observer could not possibly be led to purchase one garment supposing it to be the other garment and the manufacture at this date of the design garment of Letters Patent No. 54,809 would not constitute an infringement of the design garment of Letters Patent No. 56,450. That which does not infringe if later, does not anticipate if earlier.

Defendant's Ex. "G", Design Letters Patent No. 52,720, is the same as the design garment of Letters

Patent No. 54,809, Defendant's Ex. "H", the only difference as to appearance being that the design garment of Letters Patent No. 52,720 is highly ornamented, whereas the ornamentation of said letters patent is absent in the design garment of Letters Patent No. 54,809. The design of each letters patent is the same and, as hereinafter pointed out, this Court held the two designs to be the same and Design Letters Patent No. 54,809 to be invalid in view of the previous Design Letters Patent No. 52,720 granted to the same party.

Whatever differences we have pointed out between the design invention of Letters Patent No. 54,809 and the design of the letters patent in suit, applies with full force relative to Design Patent No. 52,720 and the design garment of the letters patent in suit.

As well stated by witness Eloesser, referring to defendant's Ex. "H":

"This is the style of romper that was put on the market by Patsy. It has not any legs, it has an opening for the feet to go through with a cuff effect. It is not a play suit or a long-legged affair in any sense of the word. Ex. "G" partakes of the same general expression as Ex. "H" except that it has a little different ornamentation on it."

In the comment thus made relative to Defendant's Exs. "G" and "H," witness Eloesser is supported by this court in holding the two design inventions of the mentioned Exs. to be the same.

Defendant's Ex. "I," United States Letters Patent No. 1,255,491, discloses and claims a child's garment provided with a body portion and a flaring skirt por-



tion. It has a closed front and a divided back, but we fail to note any similarity between this skirt garment and the design one-piece play suit of the letters patent in suit and we may dispose of this by reference in the testimony of witness Eloesser, wherein he states with reference to said Ex. "I":

"That seems to be a one-piece garment, with a skirt; it does not seem to have any type of legs at all, it is quite different; I think the fact that it has a skirt and hasn't any legs to it would make it so different that we need consider it no further."

The entire arrangement of the garment, its manner of construction as described in the specification of the patent and illustrated in the drawings, is so remote in every particular from that of the design one-piece garment of the letters patent in suit, that we cannot believe that defendant's counsel seriously contends that said letters patent Ex. "I" anticipates the design invention of the letters patent in suit. Fig. 3 of the drawings which accompany the said letters patent clearly discloses that the invention relates solely to the formation of a pattern which, when folded on proper lines, is adapted to produce a child's garment of the romper type and the type of romper is, as well expressed in the statement of invention, between lines 9-21, page 1 of the specification

"embodied in a garment adapted to be conveniently applied and removed, to be readily washed and ironed, and to form openings for the legs of the wearer and an intermediate diaper cover when the garment is secured in place, the margins of said leg openings and intermediate portions of the diaper cover being substantially flush with

other so that the skirt presents a substantially continuous bottom edge when the garment is in use."

Undoubtedly when the garment is applied to the person of the wearer there is produced a skirt garment, but not in any sense a trouser-type, one-piece play suit.

Design Letters Patent No. 47,447, Defendant's Ex. "J," is a design for a doll, not for a one-piece garment adapted to be applied to the person of a wearer. In every respect it differs radically from the design garment of the letters patent in suit. The shape given to that portion of the doll below the waist does not present the design given to the trouser element of the one-piece play suit of Design Letters Patent No. 56,450 in question and it cannot be said that there is any similarity between the upper or waist portion of the doll and the upper or waist element of the design letters patent in suit. There is no proof in the present case of a play garment ever having been constructed in accordance with the design of the doll illustrated in Letters Patent No. 47,447, Defendant's Ex. "J," and certainly no such garment has ever been manufactured and applied to the person of a wearer. No one could possibly be deceived into purchasing the design doll of Letters Patent No. 47,447 under the belief that he was purchasing or acquiring the one-piece design garment of the letters patent in suit. Defendant's Ex. "J," not being a one-piece garment adapted to be secured to the person of a wearer, it cannot serve to anticipate a one-piece design garment adapted to be applied to the person of a wearer. The said Ex. "J" does not illustrate a garment of manufacture in any particular.

At best, the said exhibit can only be said to illustrate a dressed doll having the appearance of a two-piece garment with a waistcoat effect and with the further appearance that the waistcoat is laced down the front. The entire proportion of the doll differs radically from the proportions of design garment of the letters patent in suit. Relative to this exhibit, witness Eloesser states:

“It don’t look as though it would be a practical design of a garment to be used. The proportions are quite different, the small waist on the doll is differently proportioned from what our design shows, also down at the hips.”

It is impossible to picture a child dressed in a garment of the outline and configuration of the design doll of Defendant’s Ex. “J,” presenting the appearance of a child when dressed in the one-piece play suit design garment of the letters patent in suit, and if it be possible to produce a garment conforming to the outline and configuration of the design doll of Letters Patent No. 47,447 it is safe to say that such garment when placed in a show or display window side by side with the one-piece design garment of the letters patent in suit would not induce an ordinary purchaser into buying the same believing he was buying the design garment of the letters patent in suit.

The foregoing letters patent and publications constitute the full list of exhibit publications introduced in evidence on behalf of defendant-appellee, in support of the defense of anticipation of the design invention of the letters patent in suit. Of these letters patent Judge Bourquin, in his decision holding the letters

patent in suit to be invalid, gave consideration to only Defendant's Ex. "E," publication entitled "The Dutch Twins" and to Defendant's Ex. "J," Design Letters Patent No. 47,447 for a doll, and on these two exhibits held the design letters patent to be anticipated.

Where anticipation or want of invention is set up as a defense on the part of the defendant, the burden of proof to make good such defense is upon the party alleging the same and every reasonable doubt, in view of the grant of letters patent, should be resolved against such party.

We submit that the prior art as above set forth and analyzed does not disclose anticipation or want of invention of the one-piece design garment of the letters patent in suit beyond a reasonable doubt, and that the defendant has not sustained the burden placed upon it relative to such a defense, for, as well stated in the case of *Cantrell vs. Wallick*, 117 U. S. 689:

"The burden of proof is upon the defendant to establish this defense. For the grant of letters patent is *prima facie* evidence that the patentee is the first inventor of the device described in the letters patent and of its novelty."

The court says further:

"Not only is the burden of proof to make good this defense upon the party setting it up, but it has been held that every reasonable doubt should be resolved against him,"

citing:

*Coffin vs. Ogden*, 18 Wall 120;  
*Washburn vs. Gould*, 3 Story 122.



This rule has been followed in the various Circuits, and this Circuit adhered to it in the following cases:

*San Francisco Cornice Co. vs. Beyle*, 195 Fed. 516;  
*Consolidated Contract Co. vs. Hassam Paving Co.*, 227 Fed. 436;  
*Schumacher vs. Buttonlath Manufacturing Co.*, 292 Fed. 522.

With all due deference to the opinion of Judge Bourquin, we submit that the prior letters patent and publications set up in support of the defense of anticipation fail to disclose the design invention of letters patent in suit and do not, therefore, constitute an anticipation thereof, for garments constructed under either of the said letters patent and publication exhibits if placed on the market at the present time would not constitute an infringement of Design Letters Patent No. 56,450, for an ordinary observer giving the attention that a purchaser usually gives, would not be induced into buying a garment manufactured in accordance with the disclosures of said publication and prior patents believing it to be the design one-piece play suit of Design Letters Patent No. 56,450 in suit.

### INFRINGEMENT.

Seemingly, the decision of Judge Bourquin indicates the defendant's garment to be the same as the one-piece garment of the letters patent in suit, the words employed in the decision being:

"Defendant's garment in entirety is plaintiff's in

appearance and impression, but in view of the prior state of the art, in the latter is no invention and in the former no infringement."

This is a clear expression on the part of the trial judge that if the invention of the letters patent in suit had not been anticipated by reason of the prior state of the art, infringement would have been held.

The record in the present case clearly discloses the defendant's garment to have embodied therein the invention of the design letters patent owned and controlled by the plaintiff-appellant. Witness Eloesser (Record p. 36) when called upon to make comparison between the defendant's garment and the plaintiff's garment manufactured under and accordance with the design letters patent in suit, states that Plaintiff's Ex. 3

"is a one-piece peg-top, long leg play suit, with short outstanding sleeves, and a high waist effect, and the effect of a belt joining the waist onto the trousers portion. I find on the back that the long legged peg-top effect and short sleeves are still in evidence, with the high waist, and opening down the back, and having a drop seat. This garment, # 4 (defendant's first garment, plaintiff's Ex. 4), I find, is also a one-piece long legged peg-top play suit, with short outstanding sleeves; it also has a high waist effect, and the effect of a belt joining the waist to the trousers portion. It also has in the back the same high waist effect, the long peg-top trousers and the drop seat, and it opens down the back, and I consider that the garments are practically identical in design."

and (Record p. 37) the witness testified when making comparison between Plaintiff's Ex. 5 (Defendant's second garment) and Plaintiff's Ex. 3:

"I have already examined and described Ex. 3. Plaintiff's Ex. 5 I find has the same peg-top long leg trousers portion, has the appearance of a high waist, and the effect of a belt, has square outstanding sleeves, and in the back I find that it has the same peg-top long leg trousers effect, the effect of a belt, it has a drop seat, it opens down the back, it has a square outstanding sleeve. These are the points of similarity. I find that the points of difference are that they have added a small red strip in the front, the same in the back, and I consider that in no way affects the design of the garment. I notice that the belt is not stitched down in front, but I consider that that is unimportant in the design."

The addition of the small red strip to the front and the back of the defendant's garment, Ex. 5, charged to be an infringement, does not change or vary the garment from the design invention of the one-piece play garment of Design Letters Patent No. 56,450 in suit. At best, such can only be held an additional ornament applied to the design garment of said letters patent.

The witness Eloesser was asked whether in his opinion the addition or absence of the colored strips which appear on the front and back of the garment, Ex. 5, made any difference as to the design of the play suit garment and in response testified (Record p. 38):

"I consider the design identical, and I think it would not change the design in the least if we took the red strip off of it."

Exhibit 6 is the identical one-piece play suit manufactured by plaintiff-appellant under Design Letters Patent No. 56,450, with the addition of the irregularly disposed red strips arranged on the front and back in

the manner in which they are disposed relative to the defendant's garment Ex. 5 and so applied that the same are readily removable. With the addition of these red strips garment Ex. 6 is not commercially distinguishable from Plaintiff-Appellant's Ex. 5 which is the claimed infringing garment. When the two strips are removed we have plaintiff-appellant's garment in accordance with the design letters patent in suit. (The front applied strip was removed during the course of the witness' testimony, but the back strip still appears in connection with said Ex. 6 and may be easily removed therefrom.) The addition or omission of said strips does not vary the design of the one-piece garment, for the design garment was made prior to placing the strips thereon and it is the same design garment whether the strips be added or omitted.

Miss Mae White, witness for the plaintiff, by occupation a buyer for the firm of Upright & Co. of Oakland, Calif., testified as to her familiarity with the one-piece play suits placed on the market by plaintiff and by the defendant and states (Record, p. 55) that Plaintiff's Ex. 3 and Plaintiff's Ex. 5 represent the play suits purchased by her for the firm of Upright & Co., and when asked the question

"From your experience in selling these children's play suits would, in your opinion, customers who came to purchase from your establishment play suits to match the plaintiff's design, if shown the defendant's design of play suit, believe that it was a designed garment similar to that of the plaintiff's?"

answered "They would."



and when asked whether, in her opinion, the fact that the play suit of Kuh Bros. disclosed the colored strips on the waist and on the sleeves, made it a different design garment from that of Eloesser-Heynemann Co., replied (Record p. 58) :

“No; the trimming would have nothing to do with it, they look alike.”

James Mullen, witness for the plaintiff, a merchant conducting a jobbing house of men's furnishing goods at Fresno, Calif., when questioned as to whether he had experienced any difficulty with reference to the sale of play suits within his territory by reason of the play suits manufactured, and sold, and placed on the market by Kuh Bros., testified that he had and (Record, p. 63) he gives the names of a series of merchants with whom he encountered this difficulty, and when asked to explain just what he meant by difficulty, stated :

“They could buy the Kuh garment considerably cheaper, and it takes the place of our garment.

Q. What do you mean by that ‘it takes the place of our garment’?

A. They make things so identical that they do not see the difference in it, and will accept it in place of the Kute Kut.”

“Kute Kut” is the trade name under which plaintiff's garment is sold on the market.

Paul Heynemann, witness for the plaintiff, testified (Record, p. 66) as to various stores visited by him and noting how the plaintiff's garments and the defendant's garments were displayed for sale in said stores, stating :

"Ordinarily, they are displayed by piling them on shelves; once in a while on counter display, with a suit on a model, and once in a while also in the windows on models, or draped over special racks.

Q. Is there any distinction made in the houses where you have noted the products of the defendant and the plaintiff on sale, as to how these goods are offered for sale, I mean kept separate and distinct?

A. No."

and further answering (Record p. 67) :

"There is no distinction. The garments of our manufacture and those of Kuh Bros. are piled together. According to my experience, the first one that happens to be on top is handed out to the customer, who comes in the store."

and when asked how the suits are usually designated to the trade, testified :

"They are designated as the peg-top child's garment, with long legs, high waist."

and that they are known as "one-piece garments," and when asked (Record p. 68) whether, as the head salesman for Eloesser-Heynemann Co., he had received any orders from outside territory wherein orders for play suit of Eloesser-Heynemann had been canceled by reason of the fact that the same garment manufactured by the Kuh Bros. could be purchased at a less price, testified that he had and further stated (Record p. 69) :

"In this particular case we received an order, or a copy of an order, in which certain items which had been ordered from us were scratched out, and there was a notation on the bottom by our salesman, Mr. Walburn, saying that those

items should be eliminated, because they could obtain for a less price, the same garment, and he mentioned the lot and price of Kuh Bros. illustrating definitely that they could get the same garment for a less price, and, therefore, we should not ship those particular items."

The testimony of defendant's witness, Simon E. Davis, under cross-examination (Record pp. 93, 94 and 95) clearly indicates that he as an expert, relative to the manufacture of play suits, etc., considers the defendant's and the plaintiff's garment to be the same as to the design and shape thereof, and it is somewhat significant relative to the testimony of this witness that although he himself at one time made up on behalf of Levi Strauss & Co. patterns for a one-piece, long-legged, peg-top, short-waisted effect garment, and evidently intended on behalf of said company to place the same on the market, nevertheless, according to his testimony (Record p. 75) it was due to the letters patent in suit that he discontinued the idea of marketing such a design garment and abandoned the idea. Thus defendant's own witness and at the time of making up patterns for the manufacture of such a garment, being manager of Levi Strauss & Co., gave, by the abandonment of the idea of manufacturing such a garment, full recognition to the invention of the letters patent in suit. Defendant's witness, Miss L. B. Richards, employe of O'Connor-Moffatt & Co. of this city, testified as to her familiarity with the one-piece play suits manufactured and placed on the market by Eloesser-Heynemann Co. and Kuh Bros. and as to O'Connor-Moffatt Co. carrying and selling

the two garments and, in response to cross-questions (Record p. 99) testified that one garment sells as readily as the other. Although this witness is an expert, we submit that the entire testimony given by the witness clearly establishes the identity between the two garments in question.

### ATTITUDE OF DEFENDANT.

Under the evidence as presented by the record herein, the defendant is shown to be a deliberate and wilful infringer. According to the testimony of Mr. Louis Kuh, one of the members of defendant Kuh Bros., due notice was received by the defendant from the patentees, Miller and Macowsky, relative to claimed infringement of Design Letters Patent No. 56,450 in suit by the manufacture, distribution and sale of the one-piece design play suit garment, Defendant's Ex. 4, a similar garment appearing in evidence as Defendant's Ex. "P." Relative to this notice of infringement, the witness testified in response to following direct questions (Record pp. 103-105):

"Q. Now, Mr. Kuh, tell me about any dealings or negotiations you had with Miller & Macowsky before they turned over the patent to Eloesser-Heynemann Company.

A. Well, here was the dealings we had with Miller & Macowsky; one day we received letter from Miller & Macowsky that they had secured a patent on that garment we were manufacturing, that garment similar to the one being made by Eloesser-Heynemann Company, that garment you have over there. (Referring to Plaintiff's Ex. 3.)

Q. Is this the garment?

A. Yes, we made that up in various materials, including blue denim, khaki, etc.; we had been



making up that garment, we never knew that anybody had a patent on it, and one day we were notified—you have got the date of the letter there, I don't remember the date, but it was in 1921, that we were notified by Miller & Macowsky that they had a patent on that garment, and we were very much surprised at the same, and I went over to see Mr. Feisel, of the Baby Shop, who I knew was selling these garments, Mr. E. J. Feisel, who was the man that testified this morning, and they claimed that they had been making that garment the whole time, and that it was made by a man by the name of Garfinkel, and that Miller & Macowsky had got the garment from Garfinkel.

Q. I want to get your dealings with Miller & Macowsky.

A. Well, as I said before, they wrote us a letter that we were infringing, and account of bad feeling we had between the two firms we did not pay any attention to the letter, and then Mr. Macowsky 'phoned up one day that he wanted to see me; he came over, and my brother I. D. Kuh was present at the time, he said, 'Boys, I want to be friends with you,' he said, 'I wish you would stop manufacturing that garment.' So I said, 'All right, we will let up,' and we stopped manufacturing the garment, on the condition that we could sell what stock we had, and he said that would be perfectly satisfactory to him if we would stop manufacturing the garment altogether, and we promised to do so, so we did; so we started to sell the stock out that we had left.

Q. You did stop manufacturing?

A. We stopped manufacturing the garment as soon as we had this conversation with Mr. Macowsky, and that was satisfactory to him.

Q. He agreed that you could sell what you had on hand?

A. He agreed in the presence of my brother that we could sell the garments that we had on hand."

As to this first manufactured garment of the Defendant-Plaintiff's Ex. 4, Judge Bourquin states in his decision "Subsequent to the patent defendant manufactured an identical garment."

Naturally one would expect and look to the defendant to keep full faith with the patentees after having been accorded permission to dispose of the infringing garments then in stock, on condition that they discontinued from infringing thereafter. However, instead of so doing, the defendant after disposing of the garments then on hand and admitted to be an infringement, turned its efforts to manufacturing a garment substantially similar in all respects to its former garment. This is the one-piece play suit appearing in evidence as Plaintiff's Ex. 5. In shape, configuration, outline and general appearance, it is the plaintiff's patented design garment, modified only to the extent of a slight change in the shape of the neck opening and the placing of the red strips before referred to on the front and back of the garment; making the belt loose instead of fixed in appearance and placing the patch pocket on the inside, instead of on the outside of the garment. These slight changes do not take the new one-piece play garment of the defendant from within the protection of the patented design garment of the letters patent in suit, nor do they constitute such changes nor produce such a different design garment as would prevent an ordinary observer from purchasing said garment when desiring the design garment of the plaintiff. On the contrary, under the evidence in the present case an ordinary observer would be induced into purchasing one garment believing he was purchasing the other,

and, in fact, it is disclosed that merchants refused to purchase the plaintiff's design one-piece play garment due to the fact that they could obtain the same garment from the defendant for less money.

With the claimed changed garment before him, Judge Bourquin held "Defendant's garment in entirety is plaintiff's in appearance and impression."

It is somewhat interesting to note the manner in which the so-called changed garment was produced by the defendant. With full knowledge of the invention of the design letters patent in suit, knowing that the garment it had agreed to discontinue the manufacture of took well with the public and commanded a ready sale, the following steps, according to the testimony of Mr. Louis Kuh, were resorted to. *Not without full knowledge of the patent in suit*, as stated by counsel for defendant in his points and authorities filed with the lower court, but will full knowledge thereof.

Defendant carefully looked over and examined the various suits for children it then had in stock for one disclosing a trouser portion in resemblance of such section of the garment it had been making and another having an upper section similar to the upper portion of said garment. The result of this examination was the location of Defendant's Exs. "M" and "O." Neither of these garments conform to the one-piece design invention of the letters patent in suit. Ex. "M" is a creeper for babies, has no legs nor does the creeper body conform to the body section of plaintiff's design one-piece garment; while Ex. "O" is a boy's wash suit, which in no manner conforms to the said design garment.

Even with Exs. "M" and "O" before him, Mr. Kuh was unable to produce the defendant one-piece design play garment, Plaintiff's Ex. 5, but was required to call to his aid an expert, Miss Henrietta Loeb, and with the former infringing garment Ex. 4 before them and with full knowledge of the one-piece design play suit of the patent in suit, they proceeded to outline the so-called new garment, Plaintiff's Ex. 5. This is best outlined by the testimony of Miss Loeb, buyer for the Emporium of this city, having charge of one of its downstairs departments handling infants' wear and muslin underwear. Her testimony (Record p. 123) is:

"Mr. Kuh 'phoned to me one day and said, 'Miss Loeb, we are going to make up and bring out a new garment, and I would like to see you in regard to it.' So I came down to the office, and he showed me two garments, these two garments right here.

Q. You mean the pink garment and the blue garment?

A. Yes, one was a creeper and the other was a boy's wash suit.

Q. Which is the creeper?

A. This one here.

Q. This one marked Exhibit "M" is what you call a creeper?

A. Yes.

Q. And the other one, which is marked Ex. "O," you call that a boy's wash suit?

A. A boy's wash suit.

Q. Proceed.

A. So he showed me the two garments, and he said he thought he could combine the two, and I said, 'That is a very splendid idea, if you do, just change your yoke and make it round and put a belt in front; I suggested that, and the garment was shown me a few days later—a sample was shown me a few days later, and I just suggested



making it round here, instead of square, and having the belt come across the front, to make a decided girls' garment."

It will be noted that the idea of making an effort to combine two garments by taking the upper portion of one garment and the lower portion of the other garment so as to produce a one-piece garment did not occur to Mr. Kuh until after he had received notice of infringement from the patentee of the letters patent in suit by reason of the first one-piece design play suit Ex. 4 which the defendant had been placing upon the market and not then until after he had agreed to discontinue the infringement on being accorded permission by the patentees to dispose of the number of such garments which the defendant then had on hand. It is obvious that merely cutting away the lower portion of the child's creeper romper Ex. "M" and the upper portion of the boy's wash suit Ex. "O" and sewing together the respective upper and lower sections of the two garments, would not and did not produce the one-piece play suit design invention of the letters patent in suit; other steps were necessary to produce the said designed garment as it appears and illustrated by the so-called new garment, Plaintiff's Ex. 5, as disclosed by the testimony of Miss Loeb. Something in addition to the mere sewing together of the lower severed portion of Ex. "O" and the upper severed portion of Ex. "N" was required in order to produce the one-piece play suit, Plaintiff's Ex. 5, manufactured and placed on the market by the defendant, and these steps or changes required and resorted to were so done in order to produce the one-piece design play suit

invention of the plaintiff. It is exceedingly questionable to our mind whether or not Mr. Kuh or the defendant would have been able to produce the garment, Plaintiff's Ex. 5, had it not been for the fact that he utilized the expert knowledge of Miss Loeb. The expression "*that is a splendid idea*" given utterance to by Miss Loeb when Mr. Kuh explained what he wished to do, is significant and certainly is expressive in the highest degree that if the suggested idea could be carried out there would be produced a *new and attractive design one-piece garment* over the design garments of Ex. "M" and Ex. "O," and such "*splendid idea*" was expressed in the garment as ultimately produced having embodied therein the design invention one-piece play suit of plaintiff's Design Letters Patent No. 56,450, and with which the defendant was thoroughly familiar. The produced garment is in appearance and impression the said patented one-piece design garment. The application of the red strips to the front and back of the garment does not make it any less the design garment of the letters patent in suit, nor did the removal of the patch pockets from the front exterior of the garment to the front interior thereof take the same from within the design invention of the letters patent. Such slight variations of the garment, Plaintiff's Ex. 5, from the design one-piece play suit of the letters patent are mere equivalents and do not differentiate the said garment from the design invention of said letters patent to such an extent as to preclude or prevent an ordinary observer from purchasing the said garment believing he was purchasing the design garment of the letters patent. They are

the same garments as to curvature, configuration, angularity, belt and ornamentation, so much so that an ordinary observer in purchasing one garment would be led to believe it was the other, and the resemblance of one to the other is so close as to deceive an ordinary observer and sufficiently alike to induce him to purchase one, supposing it to be the other.

We assert without hesitation that the defendant wilfully appropriated plaintiff's design invention, after agreeing to discontinue the manufacture and sale thereof on being given permission to dispose of the stock it had on hand of its first manufactured infringing garment. It now appears that such agreement was entered into by the defendant with a mental reservation, viz: We will discontinue the manufacture of the particular design garment complained of (Plaintiff's Ex. 4), but shall immediately proceed with the manufacture and sale of a so-called new garment (Plaintiff's Ex. 5) substantially the same as our former infringing garment as to shape, curvature, configuration, angularity and belt effect in order that our trade may not know the difference between the two garments, but will place upon the garment slight additional ornamentation. Our position then will be it is a new garment, although the trade will not differentiate the two garments.

Such actions should not be sanctioned by a Court of Equity. Any doubt as to infringement and validity of the letters patent in suit should under circumstances such as here presented, be resolved in favor of the plaintiff. In fact, the language of the Circuit Court of Appeals in the case of *West vs. Frank*, 149 Fed. 423,

is applicable to the present case and should be given full force and effect, viz:

“If there be a doubt as to whether the departures constitute invention, it should be resolved in favor of the patent, not only by reason of the presumption arising from the grant, but also because the patented construction was retained on account of the novelty of the design, notwithstanding certain objections resulting from its peculiar conformation, and, furthermore because of the evidence as to the much greater popularity of the new design, because of its attractive appearance, and, finally, because of the actual bodily imitation by the defendant of the exact patented construction, under circumstances which indicate an inequitable attempt to appropriate the benefit shown to have resulted from the harmonious arrangement and proportions of the patented design.”

## PUBLIC ACQUIESCENCE AND RECOGNITION.

In any given case where public acquiescence and recognition have been given to the invention of letters patent, we are safe in assuming that that which is produced under the letters patent differs from all things which preceded it and to such an extent as to give the stamp of approval thereto as to novelty, originality and ornamentality. Under the record as here presented, we find that the design garment of the letters patent in suit was first manufactured by the patentees Miller and Macowsky in the early portion of the year 1919, said parties being then engaged in this city in the manufacture of children's garments. The article was placed upon the market by Miller and Macowsky prior



to the filing of their application for Design Letters Patent No. 56,450 and during the pendency of the application the garment manufactured by Miller and Macowsky was first brought to the attention of defendant's witness, H. Garfinkel, who at that time was located in San Francisco and engaged in the manufacture of children's dresses. The garment appealed to defendant's witness Garfinkel as being new, novel, of merit and attractive to such an extent that he proceeded to manufacture and market the one-piece play suit, using the design garment of Miller and Macowsky as a sample to go by. According to the testimony of said witness Garfinkel, the one-piece play suit manufactured by him was a counterpart of Miller and Macowsky's one-piece design play suit and he placed the same upon the market under the name "Micky." The first sale of 24 dozen "Micky" play suit garments was made by him to E. J. Fiesel of San Francisco through his house manager, A. S. Lowenstein. At this time witness Garfinkel was conducting his business under the name of "California Art Works" in the City and County of San Francisco, California. In addition to selling to E. J. Fiesel the garment known as "Micky," Defendant's Ex. "A," witness Garfinkel testifies that he sold the garment to the Emporium and to other stores, but this one-piece play suit garment manufactured and sold by witness Garfinkel under the name "Micky" was the design invention of Miller and Macowsky, and on notification that the design garment was their invention, Mr. Garfinkel very promptly discontinued the manufacture thereof, stating in this connection when asked whether or not he

disclosed his "Micky" garment to Miller and Macowsky:

"No, Miller and Macowsky came up to the factory one day and Mr. Macowsky, I believe he made a kick, in fact, told me there was a patent pending and it would be advisable for me not to make them; and it was for that very reason I stopped making them a short time after, I did not want to get involved. If there was a patent applied for at that time I did not know." (Record p. 76.)

and in response to the first cross-question asked the witness (Record p. 75) he stated that the garment which he manufactured under the name "Micky" was copied from the play suit of Miller and Macowsky. The design garment of the letters patent in suit certainly appealed to the manufacturer Garfinkel as an article of merit and novelty, else he would not as soon as he saw the garment have undertaken to reproduce and market the same. The garment must have appealed to A. J. Fiesel, else he would not have purchased the garments so made by Garfinkel, and the same holds true as to the Emporium.

Eloesser-Heynemann Co., plaintiff-appellant, at the request of an Oakland house dealing in children's suits, turned its attention to the production of a one-piece play suit, mainly for girls, which would be attractive and unique in its appearance. The result of their efforts was the production of plaintiff's one-piece play suit Ex. 3. This garment met with the hearty approval of Whithorne and Swan, of Oakland, California, and plaintiff-appellant proceeded to manufacture the garment on orders from said Oakland house. Shortly after the manufacture and sale there-

of, Eloesser-Heynemann Co. was notified by Miller and Macowsky that the garment so manufactured and sold constituted an infringement of the design garment of Letters Patent No. 56,450 in suit and this resulted in Eloesser-Heynemann Co. first taking a license from the patentees, Miller and Macowsky, and later purchasing the letters patent outright. The design garment was new to the manufacturing house of Eloesser-Heynemann Co., and equally so to Whithorne and Swan, these being houses keeping abreast of the times and fully cognizant of the various types of garments placed upon the market by merchants generally, and, more particularly, by their competitors in business. At the time Eloesser-Heynemann Co. produced their one-piece play suit they were not aware of the design garment of Miller and Macowsky, due to the fact that the same was only manufactured at that time to a limited extent and only placed upon the market a short while prior to the designing of what they then believed to be a new and original garment. We thus have acquiescence on the part of Garfinkel and by Eloesser-Heynemann Co. as to the invention of the letters patent in suit and Mr. Eloesser testified, in response to a question whether the public generally gave recognition to the letters patent in suit as follows (Record p. 33) :

“There has been a good deal of acquiescence, Mr. Acker. There have been a number of large concerns that manufactured this garment at one time, and who, upon notification, have ceased manufacturing it.”

and further advised that no one at the present time,

other than the defendant-appellee, is manufacturing the infringing garment. As showing the popularity of the design garment, and the ready reception which it met by the public, it is only necessary to direct attention to the testimony of witness Eloesser in response to the question as to whether or not sales had increased from year to year, his testimony being (Record p. 40) as follows:

“In 1919 we sold 17,176 garments, in 1920 we sold 32,760 garments, in 1921 we sold 134,748 garments, and in 1922 we sold 176,640 garments” (a total of 361,324 within a period of approximately three years),

and when asked whether the plaintiff was required to increase its manufacturing plant to take care of orders (Record p. 41):

“We have made considerable increases in our plant which was not nearly adequate to take care of the additional and specially large increase from 1920, to 1921, which outran our capacity, and we spent considerable sums of money in enlarging our plant to take care of the additional demand and provide for future growth.”

From the foregoing we feel confident that public acquiescence and public recognition has been given to the letters patent in suit. Of the large class of manufacturers of children's garments doing business in San Francisco, California, we find defendant Kuh Bros. the only one continuing the infringing act, all others having ceased on notification and respecting the rights of the plaintiff herein under the design letters patent.



## LAW OF THE CASE.

We respectfully submit that since the decision of the United States Supreme Court in the case of *Gorham Mfg. Co. v. White*, 81 U. S. 731, the leading decision bearing on the question of design letters patent, the courts have uniformly held the test relative to infringement of design letters patent to be:

“Whether in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same; if the resemblance is such as to deceive such an observer, inducing him to purchase one, supposing it to be the other, the one first patented is infringed by the other.”

In *Untermeyer v. Freund et al.*, 37 Fed. 342, it was held by Judge Coxe:

“The policy which protects a design is akin to that which protects the works of an artist, a sculptor or a photographer by copyright. It requires but little invention, in the sense above referred to, to paint a pleasing picture, and yet the picture is protected, because it exhibits the personal characteristics of the artist, and because it is his. So with a design \* \* \* the advantage, slight though it be, which attends such enterprise, and a rival in business should not be permitted thus openly and defiantly to invade the territory of another.”

In *Bush & Lane Piano Co. v. Becker Bros.*, 209 Fed. 233, Judge Hazel held:

“It is true enough that a design patent must involve invention; but its validity is not negatived by combined features that were separately found in other articles of this class.

“To constitute infringement, it is not absolutely essential that the defendant’s design for its piano should be a Chinese copy of complainant’s; but, under the doctrine of *Gorham v. White*, 14 Wall. 511, 20 L. Ed. 731, infringement is complete if the defendant’s piano imparts to the mind the same general idea of ornamentation and appearance as does complainant’s design.”

In line with the foregoing is the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Mygatt et al. v. Schaffer*, 218 Fed. 827, the Court stating:

“A design patent necessarily must relate to subject matter comparatively trivial and the courts have looked with greater leniency upon design patents than patents for other inventions. The object of the law is to encourage those who have the industry and genius to originate objects which give pleasure through the sense of sight.”

In *Ashley et al. v. Weeks-Numan Co.*, 220 Fed. 899, the Circuit Court of Appeals for the Second Circuit states:

“It is not a proper test to place the two inkstands side by side, to determine whether or not there are certain differences. On the contrary, the correct test is whether the ordinary observer, giving such attention as a purchaser usually gives, would purchase the defendant’s inkstand believing it to be that of complainants; and in applying that test it is necessary to observe that the subject matter relates to form and configuration of which no one had ever seen the like prior to the patent in suit. \* \* \* It is true that the exact dimensions found in the complainants’ inkstand are not found in the defendant’s inkstand. It is also true that the exact configuration of the cover in the complainants’ inkstand is not present in the ink-

stand of the defendant; it is also true that defendant makes its inkstand with a black composition cover only, while the complainants make theirs both with a glass and a black composition cover; and it is true that defendant makes a circular pin tray instead of a rectangular one, and forms its pen rack by a groove in the cover, as distinguished from the pen rack formed by the raised portions of the complainants' inkstand."

In the case of *Inflexible Co. v. Megibow*, 251 Fed. 924, Judge Rellstab, quoting from *Phoenix Knitting Works v. Bradley Knitting Co.*, 181 Fed. 163, states:

"A design is patentable, if it presents to the eye of the ordinary observer a different effect from anything that preceded it, and renders the article to which it is applied, pleasing, attractive, and popular, even if it is simple, and does not show a wide departure from other designs, or if it is a combination of old forms."

The Court continuing:

"The plaintiff's design fully meets this test. The presumption of invention that arises from the grant of the plaintiff's letters patent is not overcome by the evidence in this case, and there is nothing on the face of the design that would justify this court in declaring that it was not the product of the inventive faculty."

In *Zidell v. Dexter et al.*, 259 Fed. 582, the same being for infringement of design letters patent relating to child's garment, the Court appreciated that differences existing between the defendant's design and the design of the plaintiffs' for letters patent did not suffice to relieve the defendant from the charge of infringement, where such differences comprised features

added (as in the present case) by the defendant to the design of the plaintiff, stating:

“As to Ex. No. 6 (and which was the garment held to be an infringement): the only difference worthy of notice between the article patented and Ex. No. 6 is the absence of the square neck, the addition of a belt to cover the waistband, and the pockets in the flaring hips. Ex. No. 6 was evidently created in the shape in which it is for the very purpose of avoiding the patent, by having a neck in the shape of a heart, rather than a square neck. But the change in that regard is not substantial. The creator of Ex. No. 6 has added a belt to the garment, which cannot be done to avoid infringement. Ex. No. 6 embodies all the features of the patented article, and the addition of the belt is of no consequence. The pockets in the flaring hips may be both useful and ornamental to this design, but it is something added to the patented article. The Court is of the opinion that Ex. No. 6 infringes.”

In the present case, defendant makes the neck opening of the play suit round instead of square, such being the only distinction between the first manufactured infringing one-piece play garment Ex. 4 and the patented design play garment of the plaintiff. As to the second one-piece play garment, Ex. 5, we find the same change in the neck opening, that is to say, a round opening instead of a square opening, and there has been added to the garment the feature of a red strip, arranged in an irregular line on the front and back of the garment above the waistline, and the patch pockets are arranged in the flaring hips of the article. These differences do not create a different design garment and in no manner differentiate the article from



the invention of the design letters patent in suit, for the same appearance is presented to the eye of the purchasing public.

The validity of the Zidell patent in the mentioned case was sustained on appeal from the decision of Judge Trippett, the case being reported 262 Fed. 145, this Court holding:

“The differences in designs, which under the patent law will avoid infringement, are differences which will attract the attention of the ordinary observer, giving such attention as the purchaser usually gives in buying articles of the kind in question and for the purposes for which they are intended.”

In the case of *Faris et al. v. Patsy Frock & Romper Co.*, 273 Fed. 900, decided by this Court June 6th, 1921, two design letters patent were presented, one being a design for an ornamented child's romper and the other being a non-ornamented child's romper. The second letters patent, or the one for the unornamented child's romper, were held invalid in view of the previously issued letters patent to the same inventor for the ornamented child's romper, on the ground that to make the ornamented design one would be required to make the unornamented design and such would constitute infringement of the then existing design letters patent for the non-ornamental child's romper, thereby holding that it was the design of the garment itself which determined the question of infringement and not the manner in which the ornamentation was applied to the garment.

In *Knappp v. Will & Baumer Co.*, 253 Fed. 191,

District Court of New York, Judge Ray held, citing with approval from the case of *Grelle v. City of Eugene, Oregon*, 221 Fed. 68:

"That each separate element in a patented design was old does not negative invention, which may reside in the manner in which they are assembled."

This was a case relating to a design letters patent for the design of candles and in commenting on the act of the defendant the Court stated:

"It is not the case of 'a Chinese copy,' but still complainant had a new and a novel design, pleasing to the eye, and defendant has copied it, with the changes mentioned, leaving the same general impression on the beholder who sees the two. The resemblance is such as to deceive the ordinary observer and purchaser,"

further stating:

"Defendant says the complainant's candle belongs to the 'Mission' age or period in candle making, and that defendant's candle belongs to the 'Colonial' style or period in the same art; that the one is distinctive and clearly distinguishable in structure and appearance from the other. This I cannot see. The slight change in the shape of the bell-shaped top has no substantial effect on the general appearance. The defendant has a patent for its design. This is evidence of a possible improvement in design clearly. To it I have called attention. But I think it well settled that, if a defendant appropriates an invention, be it a mechanical apparatus or a design, for which a patent has been granted, and improves upon it and obtains a patent, his patent covers his improvement, to which improvement he has the sole and exclusive right; but this subsequent patent does not impair

the rights of the prior patentee, nor does it confer on such subsequent patentee any right to use or appropriate it, and to use or make it in connection with his improvement, he infringes. In short, a valid patented invention is in no way annihilated or impaired by an improvement thereon by another and duly patented, and which improvement, in order to be of use, necessarily must be used with the invention of such prior patent. A valid pioneer invention, or an improvement thereon, may be improved upon as matter of course, and the improvement may be patented if it discloses patentable invention; but the improver cannot avail himself of the prior invention and appropriate it, in order to make his patented improvement available. If he does, he is liable as an infringer. *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017."

In *Sampson v. Silverman et al.*, 275 Fed. 123, the Court states:

"In dealing with patents for design we must bear in mind that simplicity of line is often more desirable than ornate treatment, and that the evidence afforded by public acceptance of a design is entitled to special weight. Those who manufacture articles of ornament appealing to the public, and who adduce evidence showing a high degree of public satisfaction with the design and who also adduce evidence from other manufacturers of their acceptance of the design and their application for licenses to manufacture, may invoke the doctrine that the presumption of validity is to have weight with a court, especially against an infringer, who, by copying the design, had added his own evidence to its value and utility."

The contention by an infringer that the device which he infringes constituted no advance in the art is

not received with favor. *Lehnbeuter v. Holthaus*, 105 U. S. 94, 95, 96, 97, 26 L. Ed. 939 (a design patent); *Westinghouse Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 616, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.); *Aurora Mantle & Lamp Co. v. Kaufman*, 243 Fed. 911, 914, 156 C. C. A. 423.

Commenting relative to the law as expressed by the United States Supreme Court in *Gorham v. White*, supra, and followed by the cases herein cited, counsel for defendant-appellee announced to the lower court that said case had no application here—due to the fact that the decision was based upon the Act of March 2, 1861, stating said act had long since been repealed. The test, as applied in *Gorham v. White*, for determining the question of infringement regarding design inventions, applies with full force today irrespective as to the amendment of the Act of 1861. In fact, this Court relied in the main upon the case of *Gorham v. White* in connection with the Zidell design letters patent. The section of the Revised Statutes governing design inventions does, as counsel states, and as we have heretofore pointed out, sanction the grant of design letters patent for “any new, original and ornamental design for an article of manufacture.” It was for these features the design letters patent here involved were granted, and “*oddity, quaintness, simple artistic merit, attractiveness, popularity, and wide use*” has been found by the lower court in favor of the design invention of the letters patent in suit. Here the design invention of the letters patent involved comprises a one-piece play suit garment article of manufacture falling within the expression of this Court as



announced in the case of *Farris v. Patsy*, 273 Fed. 903, for that which design letters patent can issue, inasmuch as it is the shape, configuration, or outline given to the garment which produces the ornamental design thereof. To the design garment thus produced the inventors added certain ornamentation, viz., the color trimmings around the neck opening, at the ends of the short sleeves, and applied the belt effect disclosed by the drawings of the letters patent. However, we find the defendant-appellee's design of garment produced by following substantially the same shape, configuration, or outline, as that of the design letters patent and to such design garment the same color ornamentation applied. It is the same garment under the test for identity as expressed by the Supreme Court in *Gorham v. White* and later by this Court in construing the Zidell design letters patent.

On argument and in the points and authorities filed with the lower court, counsel for defendant contended the design letters patent were invalid because the design thereof resided in one portion of Defendant's Ex. "M" having applied thereto another portion of Defendant's Ex. "O" and in support of this position directed attention to the decision of the United States Supreme Court in the case of *Smith v. Whitman Saddle Co.*, 148 U. S. 679, stating that the therein claimed design invention resided in bringing together the front half of one saddle and the rear half of another saddle and that such did not create design invention. From this he argued that plaintiff-appellant's design of garment did not constitute invention as it comprised the mere union of one section of De-

defendant's Ex. "M" with another section of Defendant's Ex. "O." The answer to this is found (a) in the fact that in the case of *Smith v. Whitman Saddle Co.* the Supreme Court did not declare the design letters patent invalid, and (b) that the mere bringing together of the two sections of the mentioned garment exhibits does not produce the design invention of the letters patent in suit.

Counsel further directed the attention of the lower court to the file wrapper proceedings of design letters patent No. 56,450, stating that in the Patent Office the applicants limited their invention to certain details, and did not claim a broad or generic invention. Such is not a correct statement. While in the Patent Office the applicants specified certain existing differences in their design garment over the prior art cited, but did not deem it necessary to mention all the differences because the prior art did not anticipate their design invention.

Since the issuance of the design letters patent no effort has been made to expand the invention nor to claim more therefor than covered by the grant thereof. Such is unnecessary, inasmuch as the defendant's one-piece play suit—Plaintiff's Ex. 5—is the plaintiff's design invention one-piece play garment of the letters patent in suit. The differences pointed out in the Patent Office to partly distinguish the patentee's invention in certain respects from the cited prior art, are found embodied substantially in the defendant's claimed infringing garment, at least they are embodied therein to such an extent that the resemblance to the patented design garment is such "*as to deceive an*

*ordinary observer, inducing him to purchase one, supposing it to be the other."* This being so, the plaintiff's patented design one-piece play garment is infringed by the defendant's one-piece play garment—Plaintiff's Ex. 5.

In contending infringement on behalf of the defendant, as above set forth, and in view of the decision of the lower court that "Defendant's garment in entirety is plaintiff's in appearance and impression," we are not unmindful of the concluding portion of the court's decision, wherein after disposing of the question relative to the validity of the letters patent in suit and commenting as to whether defendant's garment would infringe, the statement is made, "We have to observe that in proper application of the rule of *Zidell v. Dexter*, *supra*, it would not infringe." Of course, this remark of the court is mere *obiter dictum* and perhaps need not be commented upon, but we are frank to state as to our inability to follow the line of reasoning of the court as so expressed relative to the case of *Zidell v. Dexter*. As we read said decision, it points out that in a case of this character infringement would exist. It is true in said case, this Court pointed out the differences existing between Ex. 4 and the design letters patent there involved and where said exhibit differentiated from the design garment of the letters patent, it appearing that the claimed infringing garment did not have embodied therein the ornamental stitching on the collar and cuffs of the patented design garment and furthermore, it contained no belt with buttons and it also distinctly differed from the design garment in the shape of its trousers, and further

pointed out that Ex. 5 possessed all the features of the design patent, except that it was not a single-piece garment and had no ornamental stitching; and as to Ex. 8, involved in the case, the Court held that it was similar to Ex. 4, except that it had no buttons on the belt. In other words, Ex. 8 differed from the letters patent there involved to the same extent that Ex. 4 differed from the patented design garment and in addition thereto further differed to the extent that it had no buttons upon the belt. In the present case, however, the defendant's one-piece play suit garment embodies all the features disclosed by the design one-piece play suit garment invention of the letters patent in suit, additional ornamentation being applied thereto.

Seemingly, counsel for the defendant seeks to take some advantage by pointing out to the Court that defendant has acquired the grant of letters patent for its design garment, said letters patent appearing as Defendant's Ex. Design Letters Patent No. 60,958 of May 16, 1922. The grant of design letters patent to the defendant does not in the carrying out thereof give to the defendant-appellee the right to infringe upon the previously issued design letters patent granted to the predecessor in interest of the plaintiff-appellant herein. In short, provided the letters patent herein involved are valid, the same are in no way annihilated or impaired by an improvement thereon by another and duly patented, and which improvement, in order to be of use, necessarily must be used with the invention of such prior patent. As well known, an improver cannot avail himself of a prior invention and appro-



priate it in order to make his patented improvement available and of use to himself, without the consent of the prior inventor. If he does so, he is liable as an infringer. *Cantrell v. Wallick*, 117 U. S. 689.

As we read the decision of this Court in *Zidell v. Dexter*, supra, a strict adherence to the reasoning set forth therein carries infringement in the present case, rather than non-infringement.

### CONCLUSION.

1. We submit that the errors on appeal are well founded in law and should be granted.

2. That the design invention of the letters patent in suit due to the oddity, quaintness, simple artistic merit, attractiveness, popularity and wide use of the design garment embodied therein, discloses invention over the prior art.

3. That the invention of the design letters patent in suit differs from the publication and the prior art letters patent set up as anticipation thereof, to such an extent as to warrant the finding of non-anticipation.

4. That the decision of the lower court is contrary to the law governing design inventions, not in accordance with equity and good conscience, nor in accordance with the facts of the case, and should be reversed.

Respectfully submitted,

NICHOLAS A. ACKER,  
*Solicitor and Counsel for Appellant.*



No. 4105

IN THE

United States Circuit Court of Appeals 3

For the Ninth Circuit

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ELOESSER-HEYNEMANN COMPANY

(a corporation),

*Appellant,*

VS.

KUH BROTHERS (a corporation),

*Appellee.*

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BRIEF FOR APPELLEE.

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FILED

MAY 7 - 1924

F. D. MONTGOMERY





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## BRIEF FOR APPELLEE.

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This is an appeal from a final decree made and entered on April 23, 1923, by the District Court of the United States for the Northern District of California, dismissing plaintiff's bill of complaint.

For convenience the appellant will be referred to as the plaintiff and the appellee as the defendant.

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### Subject Matter.

The suit was brought for the infringement of United States Letters Patent, No. 56,450, issued to Julius Miller and David Macowsky on October 26, 1920, and entitled "Design for Child's Romper", and subsequently assigned to the plaintiff. The

design patent sued on contains no written description, but the drawing shows the front and rear view of a child's romper having (1) a square Dutch neck, (2) short sleeves, (3) simulation of a belt, (4) long legged trousers, (5) peg tops on trousers, (6) patch pockets, and (7) high waist. Defendant at first manufactured a garment similar to plaintiff's but on notice changed to that shown in plaintiff's Exhibit No. 5. This latter garment embraces (1) a round neck, (2) short sleeves, (3) loosely detachable belt, (4) long legged trousers, (5) peg tops on trousers, (6) concealed pockets, (7) yoke, (8) cuffs, and (9) piping at yoke and cuffs.

The defenses relied on are I, Want of Invention by the Patentees and II, Non-infringement by the Defendant.

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## I.

### **THE PATENT IN SUIT IS INVALID FOR THE REASON THAT IT DISCLOSES NO INVENTION OVER THE PRIOR ART.**

Design patents are granted under Section 4929 of the Revised Statutes of the United States, which provides in part as follows:

“Any person who has invented any new, original, and ornamental design for any article of manufacture not known or used by others in this country before his invention thereof \* \* \* may \* \* \* obtain a patent therefor.”

The same rule as to invention, which applies to mechanical patents, applies with like force and effect to design patents.

In the leading case of *Smith v. Whitman Saddle Company*, 148 U.S. 674, the Supreme Court adopted the rule of law laid down in the earlier case of *Northrup v. Adams*, and held that the law applicable to a design patent

“does not materially differ from that in cases of mechanical patents and ‘all the regulations and provisions which apply to the obtaining or protection of patents for inventions or discoveries \* \* \* shall apply to patents for designs’ (Sec. 4933).” \* \* \* “To entitle a party to the benefit of the act, in either case, there must be originality, and the exercise of the inventive faculty. In the one, there must be novelty and utility; in the other, originality and beauty. Mere mechanical skill is insufficient. There must be *something akin to genius*—an effort of the brain as well as the hand. The adaptation of old devices or forms to new purposes, however convenient, useful or beautiful they may be in their new role is not invention.” “Many illustrations are referred to, as, for instance, the use of a model of the Centennial Building for paper weights and ink stands; the thrusting of a gas-pipe through the leg and arm of a statue of a shepherd boy, for the purpose of a drop light; the painting upon a familiar vase of a copy of Stewart’s portrait of Washington—none of which were patentable, because the elements of the combination were old. The shape produced must be the result of industry, effort, genius or expense, and new and original as applied to articles of manufacture.” (*Italics ours.*)

In the case of *Rose Mfg. Co. v. Whitehouse Mfg. Co.*, 201 Fed. 926, later affirmed by the Circuit Court of Appeals in 208 Fed. 564, the court held,

“The statute (Rev. St. §4929 (U.S. Comp. St. 1901, p. 3398), as amended by Act May 9, 1902, c. 783, 32 Stat. 193 (U. S. Comp. St. Supp. 1911 p. 1457)) authorizes the issue of such a patent under certain conditions to ‘any person who has invented any new, original and ornamental design for an article of manufacture’. Hence, it appears that a valid design patent demands, as has uniformly been held, an exercise of the inventive faculty the same as a mechanical patent. The design, however, thus invented must be not only new and original, but ornamental. It must exhibit something which appeals to the aesthetic faculty of the observer. *Rowe v. Blodgett & Clapp Co.* 112 Fed. 61, 50 C.C.A. 120; *Williams Calk Co. v. Kemmerer*, 145 Fed. 928, 76 C.C.A. 466.”

This was also held in the case of *Charles Boldt Co. v. Turner Bros. Co.*, 199 Fed. 139, where the court says:

“It is, of course, extremely difficult to clearly mark the line at which symmetry and attractiveness cease to be mere matters of good taste and become touched with a spark of inventive genius. Indeed, a glance at the decisions which have sustained design patents seems to suggest that there may be often more inventive genius displayed by the court in finding invention in design patents than the inventor disclosed in placing it there. However the statute means something, and when this is comprehended it is the duty of the courts to give it effect. \* \* \*

“Neither that decision” (*Smith v. Whitman Saddle Co.*) “nor the statute have, however,



been modified as to the significance of the term 'invention', used in both, and it may be assumed that, notwithstanding the construction which appellant claims the courts have later placed upon them, that term has not become meaningless, and must yet be deemed the main feature to be taken into consideration in determining the validity of a design patent."

To the same effect it was held in the case of *Steffens v. Steiner*, 232 Fed. 862,

"The question in the case at bar is not whether a design patent can be sustained, although each separate element in the design may be old, but it is whether what has been done in assembling the old elements in the new designs rose in these particular cases to the level of invention. \* \* \*

To sustain a design patent the design must involve something more than mere mechanical skill. There must be invention."

Likewise in the case of *Strause Gas Iron Co. v. William Crane Co.*, 235 Fed. 126, where the design for a sad iron was involved, the court held that

"the test for invention is to be considered the same for designs as for mechanical patents; i.e., was the new combination within the range of the ordinary routine designer? We believe that any one starting to design sad irons with the art before him, and governed only by considerations of proportion and plan, would have had no difficulty in making the plaintiff's iron."

And later, in the case of *Smith v. Peck, Stow & Wilcox Co.* 262 Fed. 415, the Court of Appeals held

"To successfully establish the validity of the design patent, and to entitle the inventor to

protection, he must establish a result obtained, which indicates, not only that the design is new, but that it is beautiful and attractive. It must involve something more than mere mechanical skill. There must be invention of design."

That the exercise of the inventive faculty applies to design patents as well as mechanical patents, is clearly recognized by this court, as will be seen from the case of *Hammond v. Stockton Combined, etc., Works*, 70 Fed. 716, where a design patent for a form of open compartment street car, which may still be seen in San Francisco was involved. The court speaking through Judge Ross held in part as follows:

"To entitle a party to a patent for a design under this Act there must be originality, and the exercise of the inventive faculty. This is so, because the statute so declares, and because it has been so decided by the Supreme Court. *Smith v. Saddle Co.* 148 U.S. 674-679, 13 Sup. Ct. 768".

Later, in the case of *Myers v. Sternheim*, 97 Fed. 625, Judge Ross again delivering the opinion of the court says that

"The exercise of the inventive faculty is just as essential to the validity of a design patent as it is to the validity of a patent for any kind of a mechanical device. *Smith v. Saddle Co.*, 148 U.S. 674; *Hammond v. Agricultural Works*, 70 Fed. 716."

In the case of *Faris v. Patsy Frok and Romper Co.* 273 Fed. 900, Judge Morrow, rendering the

opinion of this court said in reference to the Design Patent Statute, in part as follows:

“We understand now the scope and purpose of the present statute. It is limited to the promotion of the decorative arts. In the production of a design within its scope ‘there must be originality and the exercise of the inventive faculty. \* \* \* There must be originality and beauty. Mere mechanical skill is not sufficient’. And these elements must be found in an invention of a ‘new, original, and ornamental design for an article of manufacture.’”

And this court in the case of *Majestic Electric Development Co. v. Westinghouse Electric and Manufacturing Co.*, 276 Fed. 676, speaking through Judge Wolverton, said:

“It requires the exercise of inventive faculty equally in a design as in a utility patent to insure validity, and the test of invention is the same”. (Citing cases.)

In *Macomber on Patents* it is said at page 23 on the subject of Design Patents:

“Between the opinion in *Gorham v. White*, 81 U.S. 511, and that in *Smith v. Whitman*, 148 U.S. 674,—the latter modifying the former—we may approach the essential characteristics of a patentable design. It is clear that the foundation of a patentable design must be something more than mere mechanical skill, something more than artistic arrangement. It must be a distinct product of the brain, as much as the invention of a machine, though not from the same corner of the brain. It has been said that the test of infringement is whether the design in question would, to the eye of the ordinary observer, appear to be the same as the

design of the patent. Such a rule is proper in the case of a trade mark; but it is referred to here as showing how the courts have, at times, wholly missed the mark in the consideration of the essentials of a true design. A true design appeals to something more than the eye in the ordinary sense of that term. It appeals through the eye to the artistic consciousness—not by any particular feature, contour or configuration, or even a collocation of elements, as in the case of a trade-mark—and awakens a response in the mind of the person possessed of a sense of art. If it falls short of this, if to the person with this sense it is merely peculiar or ornamental, it is not the creation by one mind of that which awakens a response in the mind of another, which constitutes true design invention. It follows, necessarily, that so-called ‘mechanical’ designs are not patentable, and that one may not reinforce a mere trade-mark by patenting it as a design.”

Judge Bourquin, holding court in the Northern District of California, before whom the present case was tried, likewise followed this rule, and referring to the plaintiff’s patent and the defendant’s play suit, held that

“In both, however, there is none of the patentee’s genius of invention or artistry, but only the trade instinct of the manufacturer and salesman.”

In view of the foregoing rule of law, applied by Judge Bourquin in this case, we think it must be held that the patent in suit is void for want of invention. It merely displays the ordinary skill of the routine designer, the manufacturer, or the salesman. It does not rise to the dignity of invention.



It does not disclose anything "akin to genius". It is invalid for want of invention.

**Applying the rule of law to the facts in this case.**

Louis Kuh, together with his brother, Irwin Kuh, have been in business in San Francisco about twenty-five years. The firm is known as Kuh Brothers, Incorporated, defendant in this suit. They were the first manufacturers of play suits on the Pacific Coast.

Called as witness on behalf of defendant, Louis Kuh testified that his firm had made all kinds of children's play suits, rompers, and creepers. That in designing the defendant's garment, alleged to be an infringement, he merely took two old garments to wit, the pink romper or creeper, marked Defendant's Exhibit M, and the old blue and white play suit, Marked Defendant's Exhibit O, and combined them together into one garment, (Record p. 109.) In other words, he cut off the bottom of Exhibit M and the top of Exhibit O and this resulted in joining the top of Exhibit M with the bottom of Exhibit O, thus forming a new garment which is now alleged to be an infringement. This is in evidence as Plaintiff's Exhibit 5.

A casual examination of Exhibit M shows that the pink romper contains (1) a square Dutch neck, (2) short sleeves, (3) yoke; and an examination of Exhibit O shows that it contains (4) long legs, (5) peg tops on trousers, (6) side pockets, and (7)

waist line in simulation of a belt. A drawing showing the upper portion of Exhibit M and the lower portion of Exhibit O, appears on the opposite page.

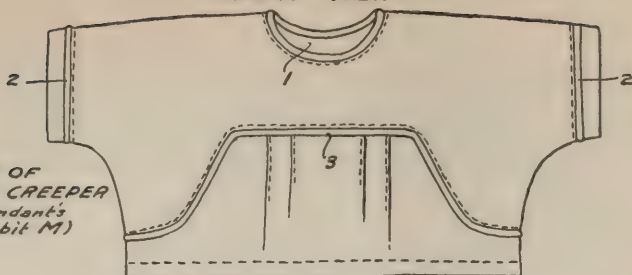
Miss Henrietta Loeb collaborated with Mr. Kuh, and by mechanical skill in using portions of these two previously manufactured garments they designed the garment now alleged to infringe. Here then is a perfect illustration of mechanical skill as distinguished from invention. Miss Loeb, whose testimony commences at page 119 of the record, fully corroborates Mr. Kuh. The garment, Exhibit M, was on the market some ten or fifteen years ago (Record p. 86), and that in evidence as Exhibit O, known as the blue and white play suit, about six or seven years before the trial of this suit. (Record p. 102.)

Other exhibits in this case are further proof that it required no invention to produce the design of plaintiff's patent. Defendant's Exhibit E, a book entitled "Dutch Twins", shows substantially every element of plaintiff's design. It shows a square Dutch neck, short arm, high waist with buttons, peg-shaped trousers, long legs and side pockets. Compare this with the plaintiff's patent, side by side, and how is it possible to conclude that the patentee displayed "something akin to genius" in producing plaintiff's design?

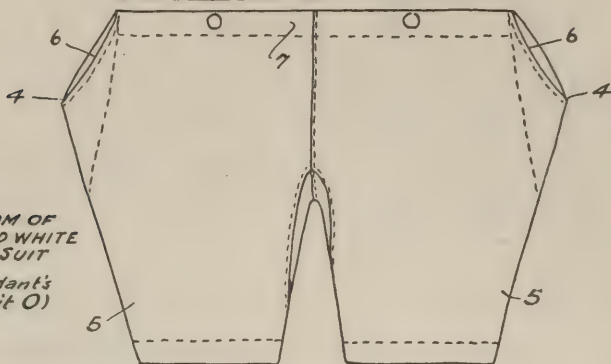
The learned judge in the lower court, in considering this phase of the case said:

"As a matter of fact, plaintiff's garment is none other than the Hollandese boy's costume

# FRONT VIEW

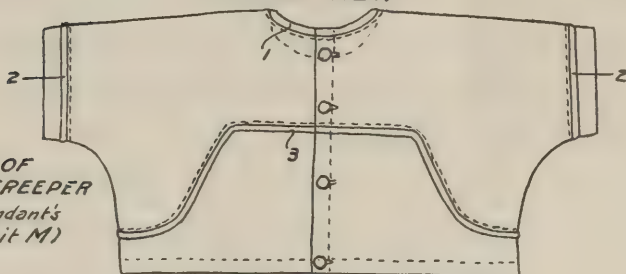


TOP OF  
PINK CREEPER  
(Defendant's  
Exhibit M)

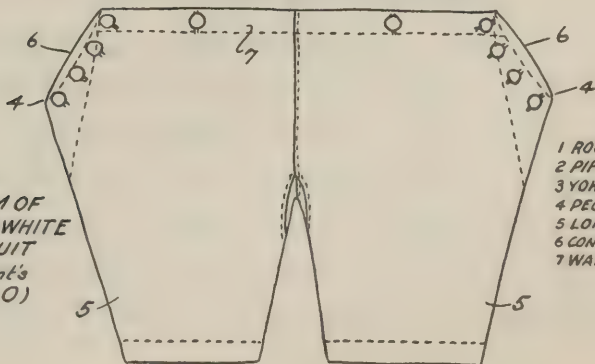


BOTTOM OF  
BLUE AND WHITE  
PLAYSUIT  
(Defendant's  
Exhibit O)

# REAR VIEW



TOP OF  
PINK CREEPER  
(Defendant's  
Exhibit M)



BOTTOM OF  
BLUE AND WHITE  
PLAYSUIT  
(Defendant's  
Exhibit O)

- 1 ROUND NECK
- 2 PIPING AT CUFFS
- 3 YOKE AND PIPING
- 4 PEG TOPS
- 5 LONG LEGS
- 6 CONCEALED POCKET
- 7 WAIST BAND

from time immemorial, known everywhere from use in original or modified forms, from paintings, engravings, illustrations and literature, to an extent warranting judicial notice" (Citing cases).

If, however, the last cited case relating to a design not thus known, be construed to forbid judicial notice as aforesaid, it is only necessary to advert to defendant's evidence thereof, viz. illustrations in Perkins' 'The Dutch Twins' published not later than 1915 by 'The Riverside Press' and various garments and designs of date not later, especially Averill's Design Patent No. 47447."

The Averill patent, referred to by Judge Bourquin is in evidence as Defendant's Exhibit J, and shows substantially everything contained in the patent sued on except the square Dutch neck. It shows in exaggerated form the peg shaped trousers, long legs, short sleeves, and patch pockets, as well as a belt with buttons.

Other exhibits, introduced by defendant which show that there is no invention in plaintiff's design are the two Zidell design patents, No. 52,720, issued Nov. 19, 1918, and No. 54,809, issued March 23, 1920, both prior to the filing of the application for the patent herein sued on. These two patents have already been considered by this court in *Zidell v. Dexter*, 262 Fed. 145, and *Faris v. Patsy Romper Co.*, 273 Fed. 900. They are in evidence in the present case as Defendant's Exhibits G and H. The



Zidell patents show a child's romper with a square Dutch neck, short sleeves, belt with buttons underneath the arm pits, peg top trousers, short legs and side pockets. Lengthen out the legs shown in the Zidell patents and we have the design of plaintiff's patent.

Defendant's Exhibit I, patent No. 1,255,491, issued to Verde on February 5, 1918, shows a square Dutch neck, short sleeves, a belt substantially the same as defendant's, and a flaring skirt. Add a pair of trousers to this patent and we have plaintiff's design.

The design patent issued to Simon E. Davis, No. 51,674, dated January 8, 1918, and introduced in evidence as Defendant's Exhibit F shows substantially the same design as Plaintiff's patent, with the exception of the peg top trousers. Add the peg shown in the Zidell patents and we have the plaintiff's design.

Is it not stretching one's credulity to assert that it would require invention, "something akin to genius", for the patentees, Miller and Macowsky to design plaintiff's garment when they had before them the Zidell design and the Davis design? The Davis design has every element of the plaintiff's patent with the exception of the pegs and these are supplied by Zidell. For convenience in making this comparison, we have reproduced Zidell Patent No.

52,720, and Davis Patent No. 51,674, on the opposite page, and underneath these appears the plaintiff's patent, No. 50,450, originally issued to Miller and Macowsky.

Not only did the patentees have before them the Davis and Zidell patents, but they are also presumed to have had before them the entire prior art, a portion of which consists of the Averill Patent, No. 47,477, the Verde Patent No. 1,255,491, the additional Zidell Patent No. 54,809, as well as the publication "The Dutch Twins", and the creations of the various manufacturers of children's creepers, rompers and play garments designed by the defendants, Kuh Brothers, as well as other concerns. Added to this we have the common examples of the United States Army trousers and the riding breeches of which the court will take judicial notice, both extensively used long before the application for plaintiff's patent. Indeed, a vivid imagination is necessary to inject invention into plaintiff's design.

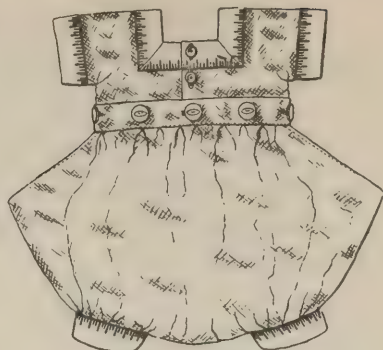
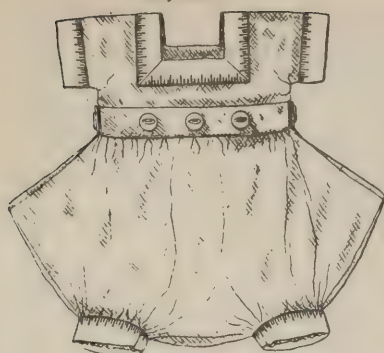
In *Smith v. Whitman Saddle Co.*, 148 U. S. 679, previously referred to as one of the leading cases on design patents and constantly affirmed and re-affirmed, the patentee took the front half of one prior art saddle and the back half of another prior art saddle and joined them together in a new saddle. The court held this to be no invention and says at page 680 of the report:

"In this case it appeared from the evidence that among other trees and saddles that were

W. I. ZIDELL.  
CHILDREN'S ROMPERS.  
APPLICATION FILED AUG 12, 1918.

52,720.

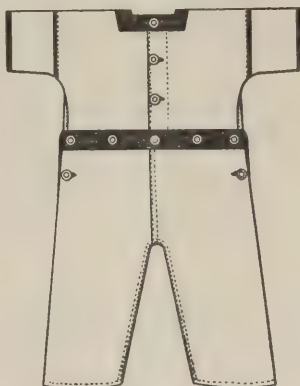
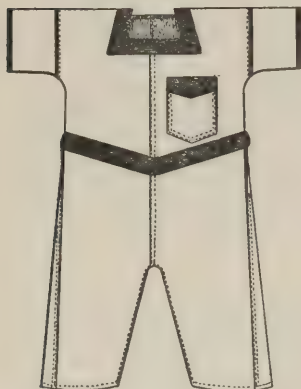
Patented Nov. 19, 1918.



S. E. DAVIS.  
CHILDREN'S ONE PIECE OUTER GARMENT.  
APPLICATION FILED OCT. 26, 1915.

51,674.

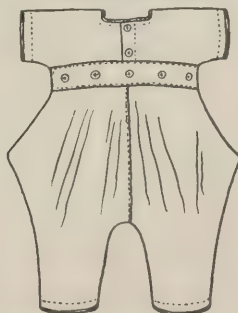
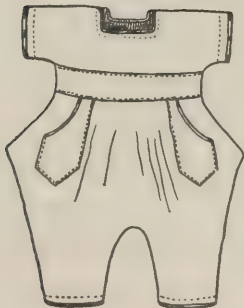
Patented Jan. 8, 1918



J. MILLER AND D. MACOWSKY.  
CHILD'S ROMPER.  
APPLICATION FILED MAY 7, 1919.

56,450.

Patented Oct. 26, 1920.



old in the prior art was one called the Granger-tree, which had a cut-back pommel and a low, broad cantle, and was well known; and another called the Jenifer tree or Jenifer-McClellan saddle, which was also well known, and had a high, prominent pommel and a high-backed cantle, or hind protuberance, in the shape of a duck's tail. \* \* \*

The saddle design described in the specification differs from the Granger saddle in the substitution of the Jenifer cantle for the low, broad cantle of the Granger tree. In other words, *the front half of the Granger and the rear half of the Jenifer, or Jenifer-McClellan, make up the saddle in question.* \* \* \*

Nothing more was done in this instance (except as hereafter noted) than *to put the two halves of these saddles together* in the exercise of the ordinary skill of workmen of the trade, and in the way and manner ordinarily done." (Italics ours.)

We submit, therefore, that the case of *Smith v. Whitman Saddle Co.*, together with the evidence of the prior art referred to, is conclusive as to the absence of invention, or "anything akin to genius" in the plaintiff's patent. In the saddle case the patentee merely took the front half of one old saddle and the rear half of another old saddle and joined them together. In the case at bar the patentees merely took the top half of one old garment and the bottom half of another old garment and joined them together. If the faculty of invention was not displayed in the first instance, it was not displayed in the second.



## II.

**BUT EVEN IF PLAINTIFF'S PATENT IS VALID, THERE IS NO INFRINGEMENT.**

Prior to, and at the time of the issuance of the patent in suit defendant had been manufacturing and selling a garment which closely resembled that shown in the patent. The garment is in evidence as Defendant's Exhibit P. Shortly after the issuance of the patent on October 26, 1920, defendant received notice from Miller & Macowsky, the patentees, to discontinue the manufacture of this garment. Later Mr. Macowsky visited defendant's place of business and after some discussion said:

"Let us get together on this, you stop manufacturing this garment, and sell what you have on your hands, and everything will be all right."

(Record page 117.)

In other words, a license was given defendant by one of the joint patentees, to sell all the garments it had on hand of the design shown in Exhibit P, alleged to infringe the Miller & Macowsky patent. (Record pages 105 and 117.)

Thereafter, and on March 8, 1921, a little more than four months after the issuance of the patent, Miller and Macowsky by an instrument in writing, assigned the patent to plaintiff. The testimony shows that the defendant still had on hand between 100 and 150 dozen garments covered by the license given by Mr. Macowsky, at the time the present plaintiff received an assignment of the patent.

(Record page 117.) Instead of disposing of this stock as it was, defendant “cut out the flare” or removed the “pegs” from the tops of the trousers, thus altering the garment to resemble that known as a “Koverall” in evidence as Defendant’s Exhibit N. These garments, so altered were sold by defendant to a store in Sacramento. (Record pages 107 and 117.) This is not denied by plaintiff.

After disposing of the garments, so altered, to the dealer in Sacramento, defendant designed a new garment, introduced in evidence as Plaintiff’s Exhibit 5 and the question therefore is whether or not Exhibit 5 is an infringement of the plaintiff’s patent.

**Patent to be construed in the light of the prior art.**

Letters patent are always construed in the light of the prior art. It was said, in the case of *Griswold v. Harker*, 62 Fed. 389, that

“the question of infringement or non-infringement must be determined by the limitations placed upon the patent by the state of the art when it was issued.”

and this has uniformly been held to be a correct statement of the law.

The questions of novelty and infringement are dependent upon the “state of the art” in design patents as well as in mechanical patents, and repeated references are found in the decisions on design patents, as to the prior art. The case of *Sutro Bros. v. Sloss*, 44 Fed. 356, is an example.

The plaintiffs' design-patented braid was a three ribbed design having something of the general appearance of a trefoil. The evidence showed that ribbed braid was old in the art. The defendant's four ribbed braid was declared not an infringement, for a broad construction could not be given the patent in view of the state of the art.

This doctrine is also illustrated in the case of *Untermeyer v. Jeannot*, 20 Fed. 503.

Another example of a design patent receiving a limited construction in view of the state of the art is the case of *Crocker v. Cutter*, 29 Fed. 456, where the court said:

“Easels made of natural cat-tails crossing each other near their upper ends are old. In view of this, the Crocker design must be limited to the mode of crossing the standards described in the patent. In defendant's design the standards are not crossed, but they are held together near the top by a band, from which point, by bending, they are spread out so as to present a fan-like appearance. If Crocker had been the first to design an easel made of cat-tails crossing each other, it might properly be held that the defendant's design infringed from the general resemblance between the two. In view however, of what was old, we have grave doubts whether the claim of the patent constitutes any invention; but, assuming the patentability of the design, we are clear that it must be limited to the mode of crossing the standards found in the specification and drawing, and, the defendant not using any form of crossing the standards, there can be no infringement, and the bill must be dismissed.”

And finally the Supreme Court of the United States in *Smith v. Whitman Saddle Co.*, 148 U. S. 678, recognizes the limitations of the prior art as applied to design patents. The state of the art in that case showed that it was customary to vary the shape of saddles to suit purchasers and it was the lack of novelty, due to the state of the art, which was an important factor in reaching the conclusion that infringement did not exist.

The rule that the state of the art limits the scope of a design patent, has also been followed by this court in the case of *Zidell v. Dexter*, 262 Fed. 145, where the court points out the prior art and then says:

“It will thus be seen that there is nothing new in any of the features of the appellants’ design. He but brought together elements that there were old and well known. \* \* \*

\* \* \* And in cases where, as here, the elements of the design are all old, and the design is illustrated by drawings only, it has been held that in the absence of specifications the patentee who combines the old elements must be held substantially to the design which he exhibits by his drawing. In *Ashley v. Samuel C. Tatum*, 186 Fed. 339, 108 C. C. A. 539, it was held that in the absence of a specification calculated to secure to the patentee the predominant feature of his device, with or without ornamentation, the absence of ornamentation as shown in his drawing must be considered an essential element of the design, and it is not infringed by another design which shows such surface ornamentation. In *R. E. Dietz Co. v. Burr & Starkweather*, 243



Fed. 592, 156 C. C. A. 290, the court said that when a specification is filed with the drawing:

‘It must be construed together with the claim and drawing, as is the established rule in respect of other patents. The rules of interpretation are not different from those regulating other patents, and a design claim may (like any other) be restricted to the specific form shown.’

‘And in *Ashley v. Weeks-Numan*, 220 Fed. 899, 136 C. C. A. 465, the court said:

‘The patentee having a patent with written specifications relating to an entirely new form of inkstand, he is entitled, not only to the exact design shown in his drawing of the patent, but also to the protection of the court against the making and marketing of inkstands, which contain the dominant features of the design described in the specification.’

‘As already shown, we have no means of knowing which, in the mind of the inventor, was the predominant feature of his design. It seems obvious that one purchaser might be attracted by the shape of the collar, another by the ornamentation stitched on the collar, cuffs, and knee bands, another by the belt with large buttons, and another by the flaring effect of the trousers.’

#### **Limiting Plaintiff's Patent by the Prior Art Defendant Does Not Infringe.**

Applying the rule to the present case, that the state of the art limits a design patent, it is obvious that the plaintiff's patent must be very narrowly interpreted, if the court should find that it possesses any invention at all. If there is anything “akin to genius”, as required by the case of *Smith v. Whit-*

*man Saddle Co.*, in plaintiff's design, it is apparent by the prior art that the "originality and beauty" displayed in the patent sued on must be limited to what is shown in the patent. The "effort of the brain as well as the hand", if it does rise to the dignity of invention in plaintiff's patent, is nevertheless restricted to such an extent, that it is readily apparent the defendant does not infringe. In the present case the differences in a design, which will avoid infringement, in view of the prior state of the art may be comparatively trivial, so long as the two designs can be reasonably distinguished.

Furthermore, as in the Zidell case, the elements of the design are all old, and where the design is illustrated by drawings only, it has been held that in the absence of specifications the patentee who combines the old elements must be held substantially to the design which he exhibits by his drawings. Holding the patentee "to the design which he exhibits by his drawings", it is clear that the defendant does not infringe.

Defendant's garment has a round neck, plaintiff's has a square neck; defendant's garment has a loosely detachable belt at the front, plaintiff's has an attached belt; defendant's garment has concealed pockets, plaintiff's has patch pockets; defendant's garment has a yoke and cuffs, plaintiff's has not; defendant's garment has piping at the yoke and cuffs, defendant's has not; defendant's garment has a fullness at the waist, plaintiff's has not; defend-

ant's garment has a high waist, plaintiff's has not; defendant's garment is primarily suited for girls, plaintiff's is not.

As an example of the slight modifications which avoid infringement, it is pointed out in the case of *Zidell v. Dexter*, 262 Fed. 147, such things as the omission of ornamental stitching, the omission of a belt with buttons, difference in the position of the flare of the trousers, the stitching of pockets and the addition of buttons, avoid infringement. This court has said:

"The garment known as No. 6 has all of the features of the patented design, excepting that the ornamental stitching is slightly different, and the collar, instead of being made square, is V-shaped. This the court held to be an infringement and the ruling in that respect is not challenged by appeal. Exhibit 4 differs from the patented design in that there is no ornamental stitching on the Dutch collar or cuffs, and no belt with buttons, and it is distinctly different in the shape of the trousers, which, instead of flaring midway, carry side pockets, flaring at the top of the trouser legs. Exhibit No. 5 has all the features of the design patent, except that it is not a single piece garment and has no ornamental stitching, and has two front pockets stitched upon the trouser legs. Exhibit 8 is similar to Exhibit 4, except that it has buttons upon the belt.

We do not think that the court below erred in holding that these garments do not infringe. In determining the question of infringement, both the character of the design and the nature of the fabric to which it is applied are to be taken into account."

In the case of *Soehner v. Favorite Stove & Range Co.*, 84 Fed. 189, involving a design patent, it is said:

“for while it must be admitted (and this is the contention most pressed by the complainant) that to the casual observer, or to one who regards their general appearance only, there is a sameness of appearance, yet it is only the sameness which results from the use by the defendant of the resources which were of right open to each,—that is, in this case, the privilege of using an old kind of ornament, in its common style of application, to the improvement of the appearance of his stoves.”

We submit therefore, that by reason of the limitation of the prior art and the differences in defendant's garment over the patented design, the defendant does not infringe.

#### **File Wrapper and Contents of Plaintiff's Patent.**

The patentees themselves, in the file wrapper and contents of the patent herein sued on, introduced in evidence as Defendant's Exhibit L, recognize what a slight variation their design was from the prior art, and what comparatively trivial differences avoided infringement.

The application for the patent herein sued on was at first rejected by the Patent Office for the reason •that

“There is held to be no invention herein over what is shown in design No. 52,720, Zidell, Nov. 19th, 1918. (Pants and drawers.) The claim is rejected and a patent is refused.”



The patentees however were not satisfied with this rejection and filed a lengthy argument with the request that the refusal of the Patent Office to allow the application be reconsidered. In this argument reference is made to the two Zidell design patents both in evidence in the present case, the first being No. 52,720 issued November 19, 1918, and the second No. 54,809, issued March 23, 1920, and it is said that

“The only apparent difference between the later patent to Zidell No. 54,809 and the earlier patent, is the removal of the blanket stitches and the omission of the buttons from the belt, and if these slight omissions constitute a patentable difference in the estimation of the Patent Office, then it is clear that the differences between the design of the present application and that of the Zidell patent of record easily amount to invention. \* \* \* Apparently, the Patent Office proceeded on the theory that a design that did not infringe an earlier one was likewise not anticipated thereby”.

Reference is then made to the case of *Zidell v. Dexter*, 259 Fed. 582, that being the report of the case in the District Court, prior to its appeal to this court. The patentee's argument proceeds as follows:

“The Court in the case of *Zidell v. Dexter et al*, reported in 259 Fed. 582, held not only that the omission of the blanket stitches avoided infringement of the earlier Zidell patent, but also stated that the omission of any one of four other features would likewise so change

the character of the design as to avoid infringement, such other features being:

- (a) The Dutch or square neck;
- (b) Short kimona sleeves;
- (c) Flaring hips;
- (d) Waist band with large buttons."

That was, indeed, the holding of Judge Trippet, before whom the case was tried and shows what slight variations avoided infringement. But the point we now make is that the plaintiff's patentees, in order to obtain the patent herein sued on, acknowledged and adopted the ruling of Judge Trippet in *Zidell v. Dexter*, later affirmed by this court, and argued that *so slight a variation as the omission of blanket stitches on a garment avoided infringement*. But the patentees were then seeking to obtain a patent and were eager to acknowledge that only minor differences constituted invention or avoided infringement.

How differently the present assignee now argues! Having obtained the patent on such representations, they now seek to expand the invention so that it assumes a broad and generic character, forgetting that in order to secure the patent, the original applicants distinguished it from the reference *Zidell* by saying:

"it is to be noted that the blanket stitches have been omitted from the cuffs and neck bands; that patch pockets have been added to the flaring hips, and that the legs of the trousers have been considerably lengthened."

Only three things distinguished their patent from the Zidell patent No. 52,720 viz.: (1) the omission of the blanket stitches, (2) the addition of patch pockets, and (3) lengthening the trousers, all elements well known in the prior art.

It is the old story of limiting and narrowing the invention in the Patent Office in order to secure a patent, and afterwards coming into court and repudiating that position and claiming a broad and generic invention. It was the variations and modifications of the prior art that secured the patent and these same variations and modifications must now constitute a limitation of its scope. Plaintiff has not secured a patent on a "peg-top" garment as its argument would lead us to believe. If that were the case, every officer of the United States Army, every gentleman rider in a country club, and every clown in a circus would come dangerously near infringement. No such scope can possibly be attributed to plaintiff's design. It consists only in bringing together old elements with possibly slight modifications in form, and the invention, if any exists, must be limited to such modifications.

#### **Defendant's Garment Distinguished from Plaintiff's Patent.**

Defendant's garment as shown in Exhibit 5 is easily distinguished from plaintiff's patent. One of the witnesses, Miss Henrietta Loeb, makes this comparison between a "Jim Dandy" garment manufactured by defendant and a "Kute Kut" garment made by plaintiff in accordance with its patented

design. The testimony commences at page 120 of the record:

“Q. Now, as a person acquainted with things of this kind, will you please point out for me the difference between these two that would attract your eye?

A. I consider these two garments entirely different, one is a strictly girl's garment, and the other one a boy's.

Q. Point out the differences between the Kute Kut and the Jim Dandy.

A. It has a fullness here.

Q. Which one do you mean?

A. This one here, the Jim Dandy.

Q. What kind of a shaped neck do you find?

A. This is a round neck.

Q. The other one, of course, is a square neck?

A. Yes, what they call a square Dutch neck.

Q. That is called a square Dutch neck?

A. Yes, just a matter of difference of opinion.

Q. What do you find with respect to the pockets of the two, as to difference?

A. This is entirely different, this is the continuation of the yoke.

Q. You mean the Jim Dandy?

A. The Jim Dandy is the continuation, and the pockets are concealed in the fullness at the sides.

Q. Where are the pockets in the other?

A. They are on the outside.

Q. Would these differences make any impression on you, or attract you?

A. Decidedly. It is a better garment for a girl.

Q. The Jim Dandy?



DESIGN.

J. MILLER AND D. MACOWSKY,

CHILD'S ROMPER.

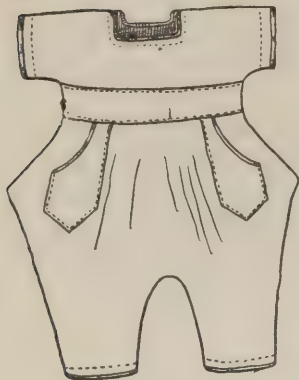
APPLICATION FILED MAY 7, 1919

56,450.

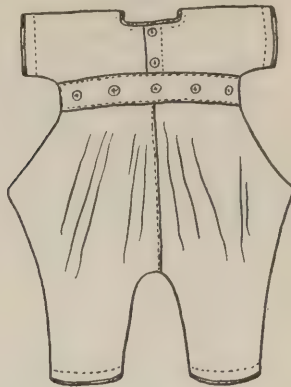
Patented Oct. 26, 1920.

PLAINTIFF'S GARMENT

*Fig. 1.*

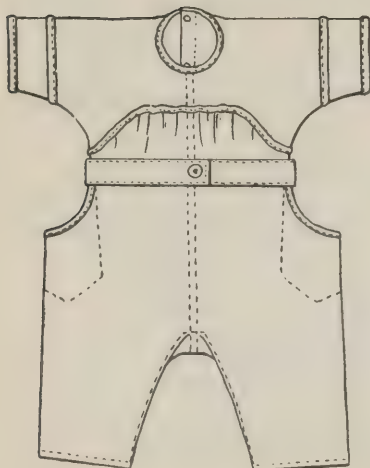


*Fig. 2.*

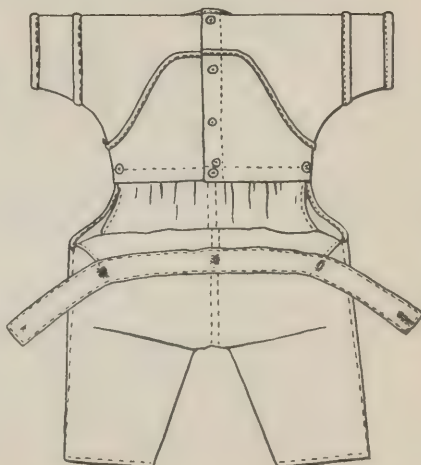


DEFENDANT'S GARMENT

*Fig. 1.*



*Fig. 2.*



A. Yes, this garment here is a better garment for a girl, and the reason why I think it is different is because it is patented, and I do not see how the United States Patent Office could issue any patent on anything that was not different. \* \* \*

Q. Now, in regard to this Exhibit 3, do you find the waist band here extending up underneath the arm-pits?

A. No. This I would consider a little bit lower, and the yoke effect is the continuation of the front; it has the same effect in the back as in the front in regard to the yoke.

Q. Does the yoke have any effect on the appearance?

A. Yes, absolutely it does.

Q. How about the cuffs?

A. The cuffs, as well, and has a loose belt.

Q. The belt has a decided effect?

A. Exactly."

To the same effect is the testimony of Miss L. V. Richards, commencing at page 97 of the Record:

"Q. Will you please point out the differences that you detect between these two garments, from examining them with ordinary care?

A. A sewed-in belt.

Q. That is, the Kute Kut has a sewed-in belt, you say?

A. Yes.

Q. What else?

A. Pockets, square neck, short sleeves, peg top.

Q. Now, the other one has what?

A. This one has a yoke.

Q. Which is the yoke there?

A. This part, here, and then it has a fullness through here that they like for girls.

Q. What do you mean by "fullness"?

A. A fullness from the yoke down, which makes a difference effect garment than the other one.

Q. This red border that you have here is the yoke?

A. This is the piping.

The COURT. Q. Is that the yoke at the back?

A. That is the yoke sewed on.

Q. There is a yoke on the back sewed on?

A. Yes. You see, there is a fullness in here that the other hasn't. That gives the fullness for a girl that is not given for a boy; that a boy does not need.

MR. MILLER. Q. What is the shape of the neck here?

A. Round; the other is square; this has a cuff, the other one has not a cuff; one has a patch pocket, and the other has not.

Q. I show you another one of these Jim Dandy garments, which I have ripped apart.

A. I know at a glance that it has a yoke.

Q. This one that I have ripped apart shows the yoke, does it?

A. Yes, the other one has not a yoke; the other is simply a bodice sewed on to the trousers.

Q. This fullness that you speak of is shown in front?

A. Oh, yes, they like that especially for girls; it is especially adapted for girls \* \* \*

Q. As a matter of fact, has anyone, to your knowledge, ever been deceived in buying one of these garments in your store?

A. No; that is the reason why we keep all of them, so as to please the customers.

Q. You would just as leave sell one as the other?

A. Equally so."

The testimony of Simon E. Davis, commencing at page 88 likewise includes a comparison of the plaintiff's and defendant's garments.

"A. The Kute Kut has a square neck, and the Jim Dandy has a round neck; the Kute Kut has no cuff, or binding, or piping in the sleeve, other than at the end, and the Jim Dandy has. The Kute Kut has no yoke or no binding where the yoke is, and the Jim Dandy has. I am just taking the front now. The Kute Kut has outside patch pockets and the Jim Dandy has inserted pockets. The Kute Kut has the simulation of a belt and the Jim Dandy has the belt. That is the only difference I can see in the front of the garment.

Q. Now take the back.

A. On the back the same remarks apply to the sleeves, the same remarks apply to the yoke, and that is all."

The defendant's garment, formerly known as the "Jim Dandy", and so referred to by the witnesses was later renamed the "Jane Dandy". (Record page 105.)

All testimony in reference to the opinion of the witnesses as to whether or not purchasers would be deceived in taking the "Jim Dandy" garment for the "Kute Kut" was excluded by the trial court. This is apparent from the following quotation from the record, at page 89, when Mr. Simon E. Davis was testifying:

"Q. Now, in view of these differences, and of the similarities that there are between the two garments, in your opinion would a person desir-



ing to purchase one of the Kute Kut garments and using ordinary caution and care that purchasers of these garments use, be deceived into taking the Jim Dandy garment for the Kute Kut, if the Jim Dandy were offered him in place of the Kute Kut?

MR. ACKER. The question is objected to as merely calling for an expression of opinion of this witness, the same objection that Mr. Miller made as to the plaintiff's witnesses.

MR. MILLER. I am entitled to show it if he was entitled to.

THE COURT. We have excluded testimony in reference to opinion, and we will do the same now."

No expert testimony therefore appears in the present case, and the question of whether or not a purchaser, using ordinary care, would be deceived in taking defendant's garment for the plaintiff's, was left for the court to decide.

#### **Variations in Garments Noticed by Women.**

The differences in designs, which under the patent law will avoid infringement, are differences which will attract the attention of the ordinary observer giving such attention as a purchaser usually gives in buying articles of the kind in question and for the purposes for which they are intended. This is the general rule applicable to design patents as set forth in the case of *Zidell v. Dexter*. In the present case by reason of the state of the art, the general rule should have a very narrow application. The record discloses that there were many types of

children's garments on the market, long before plaintiff's design. Playsuits, rompers, creepers and other outer garments for children were old. Similar garments with but slight variations, must have been well known to women who were the "ordinary purchasers", buying articles of this kind. Mr. Simon E. Davis, at page 91 of the record, testified as follows:

"Q. Who are the people who generally purchase these garments at retail?

A. Mothers or women."

Likewise Miss Richards, at page 96 of the record, testified as follows:

"Q. Who generally comes in to purchase these, what class of people?

A. Mothers.

Q. What degree of care do they use in selecting the different garments that they want?

A. They usually come and tell us what they want.

Q. How do they ask for these things?

A. They come and ask for Kute Kut, Jim Dandy, or Koveralls.

Q. Has anybody ever come in and asked you for Kute Kuts and you handed them out Jim Dandies?

A. No, we carry both.

Q. And you sell them by the names, do you?

A. Yes."

Miss Richards was employed by O'Connor-Moffatt & Co. and had charge of the children's department of that store.

The testimony, therefore, shows that women were the "ordinary purchasers" of the garments in question. Indeed, this could be assumed from the very nature of the article. To women, therefore, and especially to mothers, the various forms and modifications of children's garments were well known. They knew what they wanted. They even called the garments by name. Certainly to mothers who were making purchases for their children, the differences between defendant's and plaintiff's garments must have been readily apparent. If these differences of design attracted their attention, then under the rule of patent law previously announced the defendant's garment cannot be held to infringe the plaintiff's patent.

The same situation arose in the case of *Zidell v. Dexter*, 262 Fed. 147, where a child's garment was also involved and this court said:

"The evidence shows that at and prior to the conception of this design there were in use and on sale very many similar garments, with variations in design so slight as to leave to the ordinary observer the impression of a very general resemblance, and we must assume that to womankind, who are the purchasers in the main of this class of garment, these various coincident forms of garments were known, and whether such purchasers would be deceived into taking the garments which are alleged to infringe for a garment of the patented design would necessarily depend largely upon that general knowledge. There is no evidence that any purchaser has in fact been so misled."

We assert, therefore, that the differences in design are readily apparent to women purchasers.

**Defendant Uses Old Elements With Its Own Variations.**

Where a design invention consists only in bringing together old elements with slight modifications in form, the invention is confined to those modifications, and a person using *the same elements with his own variations of form does not infringe*, if his design is reasonably distinguishable from the patented design. That was the rule announced by this court in the case of *Zidell v. Dexter*, 262 Fed. 145, where, as in this case, a design patent for a child's garment was involved. The patent sued on in the *Zidell* case was Design Patent No. 52,720 issued November 19, 1918, and introduced in evidence in the present case as Defendant's Exhibit G. This court speaking through Judge Gilbert, said:

"The patent was obtained without specifications or description other than drawings of the design, and it gives to the public no notice that any particular element or group of elements of the design is predominant. On the face of the design the more prominent distinguishing features would appear to be (1) a square Dutch collar; (2) the ornamentation of collar, wrist bands and knee bands; (3) a belt with large buttons; and (4) the flaring or peg shape of the trousers. The prior art is shown by the Verdi patent, No. 1 255,491, issued October 15, 1917, for a 'child's garment', in which is shown a square neck, short sleeves, flaring or peg-shaped skirts, and a belt, all in general resemblance to the appellant's design. Patent No. 47,447, is-



sued to Georgene Averill, June 15, 1915, presents a combination of short sleeves, belt, and peg-shaped trousers. Patent 51,674, issued to S. E. Davis, January 8, 1918, for 'child's one-piece outer garment', exhibits the general features of the appellant's design, with the single exception that the trousers are long and have not the peg shape. An advertisement in a Los Angeles daily paper of May 25, 1917, displays a picture of a one-piece child's garment called 'Peggy Jeans', showing a square neck, short sleeves, sleeve cuffs, and belt, and an advertisement in a Los Angeles paper of June 5, 1917, shows a garment called 'Klever Kiddie', with Dutch neck, short sleeves, with cuffs, and flaring trousers, with general peg effect. Other advertisements of the year 1917, display similar one-piece rompers with the Dutch neck, short sleeves, sleeve cuffs, belts, and short trousers, the latter full, but not peg-shaped."

"It will thus be seen that there is nothing new in any of the features of the appellant's design. He but brought together elements that were old and well known. Single piece child's rompers with belts were old. Square Dutch collars were old. Ornamental stitching was old. Peg-shaped trousers were old."

The Verdi patent No. 1,255,491, issued October 15, 1917, the Averill patent No. 47,447, issued June 15, 1915, and the Davis patent No. 51,674, issued January 8, 1918, are all in evidence in the present case. In addition to these patents the book entitled "The Dutch Twins" and the defendants prior art garments, known as the pink romper and the blue and white playsuit, previously referred to, are also

in evidence, which makes the present case even stronger than the *Zidell* case. If in the former case it can be said of the patentee, that:

“He but brought together elements that were old and well known.”

Certainly it is also true of the instant case.

The court then proceeds at page 146 of the report as follows:

“In a design invention, which consists only of bringing together old elements with slight modifications of form, the invention consists only in those modifications, and *another who uses the same elements with his own variations of form does not infringe, if his design is distinguishable by the ordinary observer from the patented design.* This is the conclusion deducible from the leading case of *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606. (Italics ours.)

There can be no doubt that every element in plaintiff's design is old. This is admitted by Mr. Herbert Eloesser, vice-president of the plaintiff corporation, at page 51 of the record where he says:

“Every element of that is old; it is merely the arrangement of them that I consider novel.”

In the present case, as in the *Zidell* case, the patentee has only brought together old elements, with perhaps slight modifications in form. The defendant also uses the same old elements with its own modifications of form. Both plaintiff and defendant

having done this, under the authority of the *Zidell* case, if the designs are distinguishable by the ordinary observer, there is no infringement.

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### III.

#### **PLAINTIFF'S BRIEF WHOLLY MISCONCEIVES DEFENDANT'S CONTENTIONS.**

While certain prior patents and publications are set up in defendant's answer, as anticipating plaintiff's patent, it was not contended that any one of these singly and alone anticipated plaintiff's design. But all of these prior patents and publications together, with such additional showing of the prior art introduced in the record of this case, prove, we believe, beyond a reasonable doubt that the plaintiff's design *does not disclose invention*. Plaintiff's counsel takes up each of the prior patents and publications separately and argues at great length that this patent or that drawing does not constitute an *anticipation* for the reason that it can be distinguished from the patent in suit. Nowhere does he contend, however, that the design in question constitutes *an invention over the prior art*. In other words, considering all these prior patents, prior publications and prior garments together as constituting the state of the art at the time the plaintiff's application was filed, plaintiff's counsel does not contend that the patent in suit amounts to an invention within the meaning of the statute and as

interpreted by the courts. This is the issue raised by the defendant and this is the issue which must be met.

But in passing, it must be noted that on the question of anticipation the brief particularly refers to the prior publication entitled "The Dutch Twins", in evidence as Defendant's Exhibit "E". The principal reason urged by plaintiff, as to why this publication is not an anticipation seems to be that it discloses a three-piece garment whereas it is alleged that plaintiff's patent portrays a one-piece garment. It is obvious, however, that such a difference is not a difference in design covering the ornamentation or beauty of the garment. It is merely a "mechanical" difference. The designs may be identical although one is embodied in three separate pieces, whereas in the other, the three pieces are sewed together in a single garment. But further than this, if, as counsel states, the publication called "The Dutch Twins" does not disclose a "one-piece" garment, it can with equal force be asserted that the design embodied in the drawing of the plaintiff's patent, likewise *does not disclose a "one-piece" garment*. It may be in several pieces. The fact that the plaintiff manufactures the garment in one piece is beside the point. It is the design as shown and claimed in the patent that is material and neither in the drawing nor in the specification is there any reference limiting the design to a *one-piece garment*.



If, therefore, the “mechanical” difference, or in other words, the variation of construction is immaterial, it is obvious that the publication is almost the precise equivalent of the plaintiff’s design. In the words of the lower court:

“As a matter of fact plaintiff’s garment is none other than the Hollandese boy’s costume from time immemorial known everywhere from use in original or modified forms, from paintings, engravings, illustrations, and literature, to an extent warranting judicial notice \* \* \* it is only necessary to advert to defendant’s evidence thereof, viz., illustrations in Perkins’ ‘The Dutch Twins’, published not later than 1915 by ‘The Riverside Press’ \* \* \* between plaintiff’s design and garment and those of the illustrations of ‘The Dutch Twins’, there is no substantial difference.

In appearance and impression they are alike, are one design, of which either patented, the other would anticipate or infringe. It follows therefore that by reason of this anticipation, publication and lack of invention, plaintiff’s patent is invalid.”

In plaintiff’s brief, some stress seems to be laid on what is termed the “Attitude of Defendant” and the fact that the defendant did not keep “full faith” with the patentees. As previously stated, the defendant, prior to and at the time the patent herein sued on was issued, had been making a garment closely resembling the patented design. This is in evidence as Defendant’s Exhibit P. After receiving notice that Miller and Macowsky had received a patent on the design, defendant discontinued manu-

facturing garments of the type shown in Exhibit P and obtained a license to sell the stock it had on hand. When the patent was assigned by Miller and Macowsky to plaintiff, approximately 100 dozen of these garments remained unsold. They were then altered so as to eliminate the side extensions or "pegs" and sold to a dealer in Sacramento. (Record pages 107-108.) The garment made and sold by defendant (Exhibit P) had been designed without knowledge of the patent in suit, and the first time that defendant heard that the garment it was selling had been patented was when a letter was received from Miller and Macowsky giving notice of the issuance of the patent herein sued on. (Record pages 103-104.) So much seems to be undisputed.

After receiving notice of the issuance of a patent, and while operating under a license, the defendant decided it would manufacture an entirely different garment. Mr. Louis Kuh testified as follows on page 105 of the record:

"A. The fact of the matter is that when we first heard that Macowsky claimed that he had a patent on this garment, we had decided that we would get out another garment. \* \* \*"

A new garment was then designed in which two other garments, previously made by defendant were combined. This new garment is in evidence as Plaintiff's Exhibit 5 and is the subject matter of the present suit.

Where is there a lack of good faith on the part of defendant? It discontinued the sale of its former

garment and commenced manufacturing one that it believed would not infringe plaintiff's patent. Surely the fact that it continued to manufacture children's rompers or playsuits is no evidence of lack of good faith. On the contrary, the fact that it discontinued making a garment substantially similar to plaintiff's patent and altered its design, shows that defendant preferred to respect plaintiff's patent and wanted to avoid infringement by designing a new garment. And so the prior art was resorted to as the defendant undoubtedly had a right to do. Children's playsuits were old. Peg top trousers and the other elements used by defendant were old. These old elements were embodied in a new combination and created a design which defendant believed could be readily distinguished from plaintiff's patent. And so defendant continued manufacturing and selling children's garments as it had been doing for many years prior to the issuance of plaintiff's patent.

Plaintiff's brief also refers to "Public Acquiescence and Recognition" of the design embodied in the patent in suit. But the courts are rarely willing to accept evidence of commercial popularity as evidence of invention and will never do so unless the question of invention is one of grave doubt. On this point the Supreme Court, in *McCain v. Ortmyer*, 141 U. S. 419, says:

"That the extent to which a patented device has gone into use is an unsafe criterion, even of its actual utility, is evident from the fact that the general introduction of manufactured articles is as often affected by extensive and judi-

cious advertising, activity in putting the goods upon the market and large commissions to dealers, as by the intrinsic merit of the articles themselves. \* \* \* If the generality of sales were made the test of patentability, it would result that a person, by securing a patent upon some trifling variation from previously known methods, might, by energy in pushing sales, or by superiority in finishing or decorating his goods, drive competitors out of the market, and secure a practical monopoly without in fact having made the slightest contribution of value to the useful arts. \* \* \* While this court has held in a number of cases \* \* \* that in a doubtful case the fact that a patented article had gone into general use is evidence of its utility, it is not conclusive even of that—much less of its patentable novelty.”

The court affirmed this ruling in *Adams v. Bellair Stamping Co.*, 141 U. S. 539, and *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, and others. The District Courts and Circuit Courts of Appeals throughout the United States have made similar rulings in many reported cases, some of which have been in this Circuit, *Klein v. City of Seattle*, 77 F. R. 200; *American Sales Book Co, et al. v. Bullivant*, 117 F. R. 255, and *Hyde v. Minerals Separation, Limited, et al.*, 214 F. R. 100, being notable examples.

Defendant did not, as asserted by plaintiff's counsel “wilfully appropriate plaintiff's design inventions.” Defendant made a garment similar to plaintiff's patent long before it had knowledge of the issuance of the patent, and when defendant



found that the garment it was manufacturing had been patented by another, it promptly stopped making this garment and secured a license to dispose of the stock on hand, and then designed an entirely new garment. The yoke was added. The pockets were concealed. The loose belt was used. A fullness about the waist was substituted. Piping was inserted at the cuffs and yoke and the garment was generally altered so as to make it suitable for girls. In addition to this the name was changed from "Jim Dandy" to "Jane Dandy", so as to disassociate it from the former garment and make it characteristically feminine. Instead of the defendant appropriating plaintiff's design, it has done all in its power to avoid plaintiff's design and create a design of its own. It still however manufactures children's rompers and playsuits as it always has done, but under its own trade name and under its own design of garment.

We submit:

(1) That the plaintiff's patent discloses a design which originated through the trade instinct of the manufacturer and seller, and does not embody the genius of invention, therefore rendering the patent invalid for want of invention.

(2) That if the patent is valid, it consists only in bringing together old elements with slight modifications in form and the defendant using the same elements with its own variations does not infringe

for the reason that its design is reasonably distinguishable from the patented design.

Dated, San Francisco,  
March 5, 1924.

Respectfully submitted,

JOHN H. MILLER,

A. W. BOYKEN,

*Attorneys for Appellee.*

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

R. E. HUSTON and CLARA S. HUSTON, His  
Wife,

Plaintiffs in Error,

vs.

THE BIG BEND LAND COMPANY, a Corpo-  
ration, E. T. HAY and J. C. McCAUST-  
LAND,

Defendants in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court of  
the Eastern District of Washington,  
Northern Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the  
Eastern District of Washington, Northern  
Division.

No. 3577.

R. E. HUSTON and CLARA S. HUSTON, His  
Wife,

Plaintiffs,

vs.

THE BIG BEND LAND COMPANY, A Corpora-  
tion, E. T. HAY and J. C. McCAUSTLAND,  
Defendants.

## **Complaint.**

The plaintiffs complain and allege:

### **I.**

That during all the times hereinafter mentioned  
they were, and now are, husband and wife, were, and  
are citizens of the United States of America, and at  
this time are, and for more than three years last

past have been, citizens and residents of the State of Idaho.

## II.

That during all the times hereinafter mentioned the defendant, The Big Bend Land Company, was and now is, a corporation created, organized and existing under and by virtue of the laws of the State of Washington, with its office and principal place of business situate in the city of Spokane, Spokane County, State of Washington, is a citizen of the State of Washington and resident of the Northern Division of the Eastern District of Washington.

## III.

That the defendants E. T. Hay and J. C. McCaustland are each of them citizens of the State of Washington, and residents of the Northern Division of the Eastern District of Washington.

## IV.

That on the 4th day of March, 1915, the defendant, The Big Bend Land Company, as principal, and the defendants E. T. Hay and J. C. McCaustland, as sureties therein, in that certain proceeding for unlawful detainer of real estate in the Superior Court of the State of Washington, for Lincoln County, numbered 6836 therein, wherein the defendant herein, The Big Bend Land Company, is plaintiff, and the plaintiffs herein are defendants, made, executed, delivered and filed with the Clerk of said Superior Court of Lincoln County, their written obligation and bond wherein the defendants bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, unto

the plaintiffs herein, for the payment of the penal sum of Eight Thousand Dollars, upon the following conditions which are set forth in said bond in the words following:

“The condition of the above and foregoing obligation is such that whereas, in the above-entitled court the above-named plaintiff has commenced an action against the above-named defendants to recover the possession of certain real estate described in the complaint herein and in said action has procured a writ of restitution to be issued restoring said real estate to the possession of plaintiff.

Now, therefore, if said plaintiff shall prosecute said action without delay and pay all costs that may be adjudged to the above-named defendants and all damages that they, or either of them, may sustain by reason of the issuance of such writ should the same be wrongfully sued out, then this obligation to be null and void, otherwise to remain in full force and effect.”

V.

That on the said 4th of March, 1915, said defendant, The Big Bend Land Company, delivered the writ of restitution referred to in said bond to the sheriff of Lincoln County, State of Washington, with instruction and direction to serve and execute the same upon plaintiffs herein, and said sheriff did serve the same upon plaintiffs herein on said 4th day of March, 1915, and on the 10th day of March, 1915, said sheriff executed said writ of restitution

by ejecting the plaintiffs herein from the actual and peaceable possession of the following described lands and real estate situate in Lincoln County, State of Washington, and which are the lands and real estate described in the complaint in said proceeding numbered 6836 in said Superior Court to wit:

The fractional North half (N.1½) of Section three (3), Township twenty-four (24) North, of Range thirty-two (32) East, W. M., the same being also and otherwise, described as Lots numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 in Section three (3) Township Twenty-four (24) North of Range thirty-two East, W. M., and containing four hundred and twenty and sixty-one-hundredths (420.60) acres, more or less, according to the United States Government survey thereof

and placing The Big Bend Land Company in the possession of the whole thereof, which possession of the whole thereof of said lands and real estate the said The Big Bend Land Company has ever since said 10th day of March, 1915, kept and held, and now keeps and holds.

## VI.

That after their eviction from said premises, as aforesaid, plaintiffs employed an attorney and defendant said proceeding numbered 6836, in the Superior Court of Lincoln County, and among other things in such defense they duly moved said Superior Court of Lincoln County to quash, set aside and hold for naught the issuance, service and execution of said writ of restitution under which they



were ousted from the possession of said lands, as aforesaid, upon the grounds and for the reasons that the issuance, service and execution of said writ of restitution were each and every of them without warrant or authority of law, and were wholly void, which motion to quash was by written order duly made and entered in said proceeding duly and regularly denied by said Superior Court of Lincoln County. That thereafter such proceedings were had and taken in said cause as that a judgment was rendered therein in said Superior Court on the 14th day of September, 1915, wherein it was adjudged that The Big Bend Land Company was entitled to the possession of the whole of said land and real estate, from which judgment these plaintiffs appeal to the Supreme Court of the State of Washington. That in said appeal such proceedings were had and taken in said cause, in the Supreme Court of the State of Washington, as that on the 30th day of October, 1917, said Court rendered its decision and judgment that for want of jurisdiction all the acts and doings of said defendant, The Big Bend Land Company, in having said writ of restitution issue, served and executed, as aforesaid, were each and every of them without warrant or authority in law, and were wholly void; that the said judgment of the Superior Court of Lincoln County was reversed, and said Superior Court of Lincoln County was directed to enter its judgment dismissing said proceeding. That the *remittitur* of said judgment, decision and order of the Supreme Court of the State of Washington was duly and

regularly transmitted to the Superior Court of Lincoln County, and by the clerk of said court duly and regularly filed and entered in said cause No. 6836 on the 6th day of December, 1917, and on the first day of May, 1918, the Superior Court of Lincoln County duly made and entered its judgment dismissing said proceeding, in accordance with said judgment and order of the Supreme Court of the State of Washington.

#### VII.

That by reason of the said wrongful suing out, issuance and execution of said writ of restitution plaintiffs have sustained damages in an amount greatly exceeding the sum of Eight Thousand Dollars, as follows: For attorney fees, and expenses of attorney in said proceeding No. 6836, in the Superior Court of Lincoln County and the Supreme Court of the State of Washington, One Thousand Five Hundred Dollars. for loss of profit from crops of winter wheat which plaintiffs had growing on said land on said 10th day of March, 1915, and of spring wheat which they could have produced during the season of 1915 on summer-fallowed and fall-plowed land which they had prepared for seeding on said land, at said time, ten thousand dollars.

#### VIII.

That no part of said damages have been paid by any of the defendants herein, nor at all.

Wherefore, plaintiffs demand judgment against the defendants, and against each of them, for the sum of Eight Thousand Dollars, together with their costs and disbursements herein, and for such other

and further relief as they may be entitled to receive in the premises.

M. E. MACK  
Attorney for Plaintiffs.

State of Washington,  
County of Spokane,—ss.

I, M. E. Mack, being first duly sworn upon oath, depose and say: That I am the attorney for the plaintiffs named in the foregoing complaint. That I know the contents thereof and believe the same to be true. That I make this verification for the reason that neither of the plaintiffs, nor any agent of theirs, is within the county of Spokane, Washington.

M. E. MACK.

Subscribed and sworn to before me this 2d day of March, 1921.

[Seal] GRETA PATTISON,  
Notary Public in and for the State of Washington,  
Residing at Spokane.

Filed in the U. S. District Court, Eastern District of Washington, Mar. 2, 1921. William H. Hare, Clerk. By H. J. Dunham, Deputy.

United States of America. In the District Court of the United States, Eastern District of Washington, Northern Division.

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court in the City of Spokane.

R. E. HUSTON and CLARA S. HUSTON, His Wife,  
Plaintiffs,

vs.

THE BIG BEND LAND COMPANY, a Corporation,  
E. T. HAY and J. C. McCAUSTLAND,  
Defendants.

### **Summons.**

M. E. MACK, Plaintiffs' Attorney.

The President of the United States of America,  
GREETING: To the Big Bend Land Co., a corporation, E. T. Hay and J. C. McCaustland.

You are hereby summoned to appear in the District Court of the United States, for the Eastern District of Washington, Northern Division, holding terms at the city of Spokane, within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the Court aforesaid; and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint, now on file in the office of the Clerk of said Court, a copy of which complaint is herewith served upon you.



WITNESS the Honorable FRANK H. RUDKIN,  
Judge of the United States District Court for the  
Eastern District of Washington, and the seal of  
said District Court this second day of March, 1921.

W. H. HARE,

Clerk.

By \_\_\_\_\_,

Deputy Clerk.

United States of America,  
Eastern District of Washington,—ss.

I hereby certify and return that I have personally served the within summons, together with the complaint in the within-entitled action, upon the within-named defendant by delivering to and leaving a true copy of the said summons and complaint with Big Bend Land Company, a corporation, by leaving with E. T. Hay, Secretary of said Big Bend Land Co., a corporation, E. T. Hay personally.

J. C. McCaustland by leaving with E. T. Hay, secretary of the Co., who accepted service for the said J. C. McCaustland.

J. E. McGOVERN,

United States Marshal.

By Fred Thorpe,

Deputy.

Fees \$6.00

Mileage .06

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\$6.06

\_\_\_\_\_,  
United States Marshal.

By \_\_\_\_\_,

Filed in the United States District Court, Eastern District of Washington. March 5, 1921. W. H. Hare, Clerk. By H. J. Dunham, Deputy.

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In the District Court of the United States, for the  
Eastern District of Washington, Northern  
Division.

No. 3577.

R. E. HUSTON and CLARA S. HUSTON, His Wife,  
Plaintiffs,

vs.

THE BIG BEND LAND COMPANY, E. T. HAY  
and J. C. McCAUSTLAND,  
Defendants.

**Demurrer.**

The defendants demur to the complaint herein and for their cause of demurrer say:

1. The complaint does not state facts sufficient to constitute a cause of action against the defendants, or either of them.

2. The cause of action attempted to be pleaded in the said complaint is barred by the statute of limitations applicable thereto.

Dated 18th March, 1921.

GRAVES, KIZER & GRAVES,  
Attorneys for Defendants.

Filed in the U. S. District Court, Eastern District of Washington. Mar. 22, 1921. W. H. Hare, Clerk. By H. J. Dunham, Deputy.

In the District Court of the United States, for the  
Eastern District of Washington, Northern  
Division.

No. 3577.

R. E. HUSTON and CLARA S. HUSTON, His Wife,  
Plaintiffs,

vs.

THE BIG BEND LAND COMPANY, et al.,  
Defendants.

**Order Dismissing Cause.**

The above-entitled cause came on to be heard on this day on the application of defendants for an order of dismissal, and it appearing that the court has heretofore sustained the demurrer of defendants to the complaint of plaintiffs and has reached the decision that the defect ruled on cannot be cured by amendment, and the Court being sufficiently advised,

IT IS ORDERED that the above-entitled cause be, and the same hereby is dismissed, that defendants go hence without day and recover their costs of plaintiff, to be taxed.

Done in open court this 11th day of October, A. D. 1922.

FRANK H. RUDKIN,  
Judge.

Filed in the U. S. Dist. Court, Eastern District of Washington. Oct. 11, 1922. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy.

In the District Court of the United States, for the  
Eastern District of Washington, Northern  
Division.

No. 3577.

R. E. HUSTON and CLARA S. HUSTON, His Wife,  
Plaintiffs,

vs.

THE BIG BEND LAND COMPANY, et al.,  
Defendants.

**Memorandum Opinion.**

M. E. MACK,  
Attorney for the Plaintiffs,  
GRAVES, KIZER & GRAVES,  
Attorneys for the Defendants.

RUDKIN, District Judge.—Section 819, Remington & Ballinger's Code, provides that the plaintiff, at the time of commencing an action of forcible entry or forcible detainer or unlawful detainer, or at any time afterwards, may apply to the Judge of the court in which the action is pending for a writ of restitution restoring to the plaintiff the property in the complaint described, and the Judge shall order a writ of restitution to issue. The writ shall be issued by the clerk of the superior court in which the action is pending, and be returnable in twenty days after its date; but before any writ shall issue prior to judgment the plaintiff shall execute to the defendant and file in court a bond in such



a sum as the court or Judge may order, with two or more sureties to be approved by the clerk, conditioned that the plaintiff will prosecute his action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out.

The Defendant Big Bend Land Company attempted to commence such an action in one of the Superior Courts in this state against the present plaintiffs, and executed a bond with the defendants Hay and McCaustland as sureties, conditioned as provided by law.

A writ of restitution thereupon issued, and under and by virtue of the writ the sheriff removed the defendants in that action from the property and placed the plaintiff in possession. The plaintiff had judgment in the Superior Court, but upon appeal the judgment was reversed by the Supreme Court on the ground that the summons was defective and void and the court acquired no jurisdiction over the person of the defendants.

Big Bend Land Co: vs. Huston, 98 Wash. 640.

The present action was thereupon instituted on the bond in the unlawful detainer case. The defendants have demurred to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action. The particular objection urged is that inasmuch as the Court acquired no jurisdiction in the unlawful detainer case the bond

in question was null and void. This contention must be sustained.

In *State ex rel. Huston vs. Big Bend Land Company*, 100 Wash. 425, it was held that the Court acquired no jurisdiction in the unlawful detainer proceeding, and that the process under which the present plaintiffs were ousted from the property was so utterly void that the Superior Court did not even have jurisdiction to grant restitution upon the dismissal of the action. Under such circumstances the authorities are quite uniform that the bond is void.

*Davis vs. Huth*, 43 Wash. 383.

*Steele vs. Crider*, 61 Fed. 480.

*U. S. vs. Morris' Heirs*, 153 Fed. 240.

*Bank vs. Mixter*, 124 U. S. 721.

The demurrer is therefore sustained, and inasmuch as the defect cannot be cured by amendment, an order of dismissal will be entered.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 6, 1922. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy.

In the District Court of the United States for the  
Eastern District of Washington, Northern Di-  
vision, Sitting at Spokane, in said District.

No. 3577.

R. E. HUSTON and CLARA S. HUSTON, his  
wife,

Plaintiffs,

vs.

THE BIG BEND LAND COMPANY, a Corpora-  
tion, E. T. HAY and J. C. McCAUSTLAND,  
Defendants.

**Petition for Writ of Error.**

To the Judge of the District Court aforesaid:

Now come R. E. Huston and Clara S. Huston,  
his wife, the plaintiffs above named, by attorneys,  
and respectfully show that on the 7th day of Octo-  
ber, 1922, the Court filed herein its memorandum  
decision herein wherein it sustained the demurrer  
of the defendants to the complaint herein on the  
ground that the same did not state *state* facts suffi-  
cient to constitute a cause of action, that the defect  
could not be cured by amendment, and ordered that  
the action be dismissed, and that on such decision  
a final judgment was entered on the 11th day of  
October, 1922, dismissing said action and for costs  
in favor of defendants and against plaintiffs, your  
petitioners.

Your petitioners feeling themselves aggrieved by  
the said decision and judgment entered thereon as

aforesaid, herewith petition the Court for an order allowing them to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioners pray that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at the city of San Francisco, in said circuit, for the correction of the errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of the security to be given by plaintiffs in error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

M. E. MACK,

JOHN G. BARNES,

Attorneys for Petitioners in Error.

Writ of error granted this third day of April, 1923. Bond fixed at the sum of Five Hundred Dollars.

JEREMIAH NETERER,

Judge.

Filed in the U. S. District Court, Eastern District of Washington. Apr. 3, 1923. Alan G. Paine, Clerk. A. P. Rumburg, Deputy.

In the District Court of the United States for the Eastern District of Washington, Sitting at the City of Spokane, in Said District.

No. 3577.

R. E. HUSTON and CLARA S. HUSTON, his wife,

Plaintiffs,

vs.

THE BIG BEND LAND COMPANY, a Corporation, E. T. HAY and J. C. McCAUSTLAND, Defendants.

### **Assignments of Error.**

Now comes R. E. Huston and Clara S. Huston, his wife, the plaintiffs in the above numbered and entitled cause, and in connection with their petition for a writ of error in this cause, assigns the following errors which plaintiffs in error aver occurred on the trial thereof, and upon which they rely to reverse the judgment entered herein as appears of record:

1. That the Court erred in sustaining the demurrer to the complaint filed in this cause for the reason that the same did not state facts sufficient to constitute a cause of action.

2. That the Court erred in denying to plaintiffs the right to amend their said complaint herein, and to file such amended complaint.

3. That the Court erred in making and entering



judgment herein that this cause be dismissed, and defendants recover their costs.

Wherefore, plaintiffs in error pray that the judgment of said Court be reversed, etc.

M. E. MACK,  
JOHN G. BARNES,  
Attorneys for Plaintiffs in Error.

Filed in the U. S. District Court, Eastern District of Washington. April 3, 1923. Alan G. Paine, Clerk. A. P. Rumburg, Deputy.

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In the District Court of the United States for the Eastern District of Washington, Northern Division, Sitting at Spokane, in said District.

No. 3577.

R. E. HUSTON and CLARA S. HUSTON, his wife,

Plaintiffs in Error,

vs.

THE BIG BEND LAND COMPANY, a Corporation, E. T. HAY and J. C. McCAUSTLAND, Defendants in Error.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, that we, R. E. Huston and Clara S. Huston, his wife, plaintiffs in error, as principals, and Massachusetts Bonding and Insurance Company, a corporation, as surety, are held and firmly bound unto the Big Bend Land Company, a corporation, E. T.

Hay and J. C. McCaustland, defendants in error in the full and just sum of Five Hundred Dollars, to be paid to the said The Big Bend Land Company, E. T. Hay and J. C. McCaustland, its and their attorneys, successors, administrators, executors or assigns, to which payment well and truly to be made we bind ourselves, our successors, assigns, executors and administrators jointly and severally by these presents.

Signed and dated this the third day of April, A. D. 1923.

Whereas, lately at a regular term of the District Court for the Eastern District of Washington, Northern Division, sitting at the city of Spokane, in said district, in a suit pending in said court between R. E. Huston and Clara S. Huston, his wife, as plaintiffs, and The Big Bend Land Company, a corporation, E. T. Hay and J. C. McCaustland, as defendants, cause No. 3577 on the Law Docket of said court, final judgment was rendered against the said plaintiffs, that the said cause of action be dismissed and said defendants recover their costs to be taxed, and the said R. E. Huston and Clara S. Huston have obtained a writ of error, and filed a copy thereof in the Clerk's office of the said court, to reverse the judgment of the said court in the aforesaid suit; and a citation directed to the said The Big Bend Land Company, E. T. Hay and J. C. McCaustland citing it and them to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco,

in the State of California, according to law within thirty days from the date hereof.

Now, the condition of the above obligation is such that if the said R. E. Huston and Clara S. Huston shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to be and remain in full force and virtue.

R. E. HUSTON.

CLARA S. HUSTON.

By JOHN G. BARNES,

Their Attorney.

MASSACHUSETTS BONDING AND INSUR-  
ANCE COMPANY.

By HENRY S. JACKSON,

Attorney in Fact.

Attest: SETH H. MORFORD,

Attorney in Fact.

The foregoing bond approved this 3d day of April, 1923.

JEREMIAH NETERER,

Judge.

Filed in the U. S. District Court, Eastern District of Washington. Apr. 3, 1923. Alan G. Paine, Clerk. A. P. Rumburg, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division, Sitting at Spokane, in said District.

No. 3577.

R. E. HUSTON and CLARA S. HUSTON, his wife,

Plaintiffs in Error,

vs.

THE BIG BEND LAND COMPANY, a Corporation, E. T. HAY and J. C. McCAUSTLAND, Defendants in Error.

**Writ of Error (Original).**

United States of America,—ss.

The President of the United States to the Hon. Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between R. E. Huston and Clara S. Huston, his wife, plaintiffs in error, and The Big Bend Land Company, a corporation, E. T. Hay and J. C. McCaustland, defendants in error, a manifest error has happened to R. E. Huston and Clara S. Huston, his wife, plaintiffs in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you

if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

Witness the Hon. WILLIAM H. TAFT, Chief Justice of the United States, this the third day of April, 1923.

[Seal] ALAN G. PAINE,  
Clerk of the United States District Court for the  
Eastern District of Washington.

Allowed this the third day of April, A. D. 1923.

JEREMIAH NETERER,  
United States Judge.

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[Endorsed]: No. 3577. R. E. Huston, et ux. vs. The Big Bend Land Co. Writ of Error. Filed in the U. S. District Court, Eastern Dist. of Washington. Apr. 3, 1923. Alan G. Paine, Clerk. A. P. Rumburg, Deputy.



In the District Court of the United States for the Eastern District of Washington, Northern Division, Sitting at Spokane, in said District.

No. 3577.

R. E. HUSTON and CLARA S. HUSTON, his wife,

Plaintiffs in Error,

vs.

THE BIG BEND LAND COMPANY, a Corporation, E. T. HAY and J. C. McCAUSTLAND, Defendants in Error.

**Writ of Error (Copy).**

United States of America,—ss.

The President of the United States to the Hon. Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between R. E. Huston and Clara S. Huston, his wife, plaintiffs in error, and The Big Bend Land Company, a corporation, E. T. Hay and J. C. McCaustland, defendants in error, a manifest error has happened to R. E. Huston and Clara S. Huston, his wife, plaintiffs in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you

if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

Witness the Hon. WILLIAM H. TAFT, Chief Justice of the United States, this the third day of April, 1923.

ALAN G. PAINE,

Clerk of the United States District Court for the Eastern District of Washington.

Allowed this the third day of April, A. D. 1923.

JEREMIAH NETERER,

United States Judge.

Filed in the U. S. District Court, Eastern District of Washington. Apr. 3, 1923. Alan G. Paine, Clerk. A. P. Rumburg, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division, Sitting at Spokane, in said District.

No. 3577.

R. E. HUSTON and CLARA S. HUSTON, his wife,

Plaintiffs in Error,

vs.

THE BIG BEND LAND COMPANY, a Corporation, E. T. HAY and J. C. McCAUSTLAND, Defendants in Error.

**Citation on Writ of Error (Original).**

United States of America to The Big Bend Land Company, a corporation, E. T. Hay and J. C. McCaustland, Defendants in Error, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the United States District Court for the Eastern District of Washington, Northern Division, wherein R. E. Huston and Clara S. Huston, his wife, are plaintiffs in error, and you are defendants in error to show cause, if any there be, why the judgment rendered against the said R. E. Huston and Clara S. Huston, plaintiffs in error, as in said writ of

error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS, the Hon. JEREMIAH NETERER, Judge of the United States District Court of Eastern Washington, this third day of April, 1923.

[Seal] JEREMIAH NETERER,  
Judge of the United States District Court for the District of Eastern Washington.

Receipt of a copy, and service of the foregoing citation this 3d day of April, 1923, is hereby admitted and acknowledged.

GRAVES, KIZER & GRAVES,  
Attorneys for The Big Bend Land Co., E. T. Hay  
and J. C. McCaustland, Defendants in Error.

[Endorsed]: No. 3577. R. E. Houston et ux vs. The Big Bend Land Co. Citation on Writ of Error. Filed in the U. S. District Court, Eastern District of Washington. Apr. 3, 1923. Alan G. Paine, Clerk. A. P. Rumburg, Deputy.

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In the District Court of the United States for the Eastern District of Washington, Northern Division, Sitting at Spokane, in said District.

No. 3577.

R. E. HUSTON and CLARA S. HUSTON, his wife,

Plaintiffs in Error,

vs.

THE BIG BEND LAND COMPANY, a Corporation,  
E. T. HAY and J. C. McCAUSTLAND,  
Defendants in Error.

**Citation on Writ of Error (Copy).**

United States of America to The Big Bend Land Company, a corporation, E. T. Hay and J. C. McCaustland, Defendants in Error, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the United States District Court for the Eastern District of Washington, Northern Division, wherein R. E. Huston and Clara S. Huston, his wife, are plaintiffs in error, and you are defendants in error to show cause, if any there be, why the judgment rendered against the said R. E. Huston and Clara S. Huston, plaintiffs in error, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS, the Hon. JEREMIAH NETERER, Judge of the United States District Court of Eastern Washington, this third day of April, 1923.

JEREMIAH NETERER,  
Judge of the United States District Court for the District of Eastern Washington.



Receipt of a copy, and service of the foregoing citation this 3d day of April, 1923, is hereby admitted and acknowledged.

GRAVES, KIZER & GRAVES,  
Attorneys for The Big Bend Land Co., E. T. Hay  
and J. C. McCaustland, Defendants in Error.

Filed in the U. S. District Court, Eastern District of Washington. Apr. 3, 1923. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. .

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In the District Court of the United States for the  
Eastern District of Washington, Northern Division,  
Sitting at Spokane, in said District.

No. 3577.

R. E. HUSTON and CLARA S. HUSTON, his  
wife,

Plaintiffs in Error,

vs.

THE BIG BEND LAND COMPANY, a Corporation,  
E. T. HAY and J. C. McCAUSTLAND,  
Defendants in Error.

**Praeipce for Transcript of Record.**

To the Hon. Clerk of the United States District Court for the Eastern District of Washington:

Please prepare and return a transcript of the following papers and records in cause No. 3577 with the writ of error in the above-entitled cause:

1. The complaint.
2. The summons and return.

3. The demurrer of the defendants.
4. The judgment.
5. The memorandum opinion of the Court.
6. Petition for writ of error, order allowing and fixing bond indorsed thereon.
7. Assignment of Errors.
8. Bond and approval indorsed thereon.
9. The writ of error.
10. Citation in error and acceptance of service indorsed thereon.
11. Clerk's certificate.
12. Praeceptum.

M. E. MACK,  
JOHN G. BARNES,  
Attorneys for Plaintiffs in Error.

Filed in the U. S. District Court, Eastern District of Washington. April 5, 1923. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy.

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In the District Court of the United States for the Eastern District of Washington, Northern Division.

United States of America,  
Eastern District of Washington,—ss.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Alan G. Paine, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages are a full, true and correct and

complete copy of the record, papers, and other proceedings in the foregoing entitled cause as called for by the plaintiff and plaintiff in error in its praecipe as the same remains of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on writ of error from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California, which writ of error was lodged and filed in my office on April 3, 1923.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

I further certify that the fees of the Clerk of this Court in preparing and certifying to the foregoing typewritten record amounts to the sum of \$8.15, which sum has been paid in full by the plaintiff and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said district, this 20th day of April, 1923.

[Seal]

ALAN G. PAINE,  
Clerk.

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[Endorsed]: No. 4108. United States Circuit Court of Appeals for the Ninth Circuit. R. E. Huston and Clara S. Huston, His Wife, Plaintiffs in Error, vs. The Big Bend Land Company, a Cor-

poration, E. T. Hay and J. C. McCaustland, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Received April 24, 1923.

F. D. MONCKTON,  
Clerk.

Filed September 17, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.





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IN THE

**United States**

**Circuit Court of Appeals**

FOR THE NINTH CIRCUIT.

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R. E. HUSTON and CLARA S. HUSTON,  
*Plaintiffs in Error,*

*vs.*

THE BIG BEND LAND COMPANY,  
E. T. HAY and J. C. McCAUSTLAND,  
*Defendants in Error.*

No. 4108

*Upon Writ of Error to the United States District  
Court of the Eastern District of Washington*

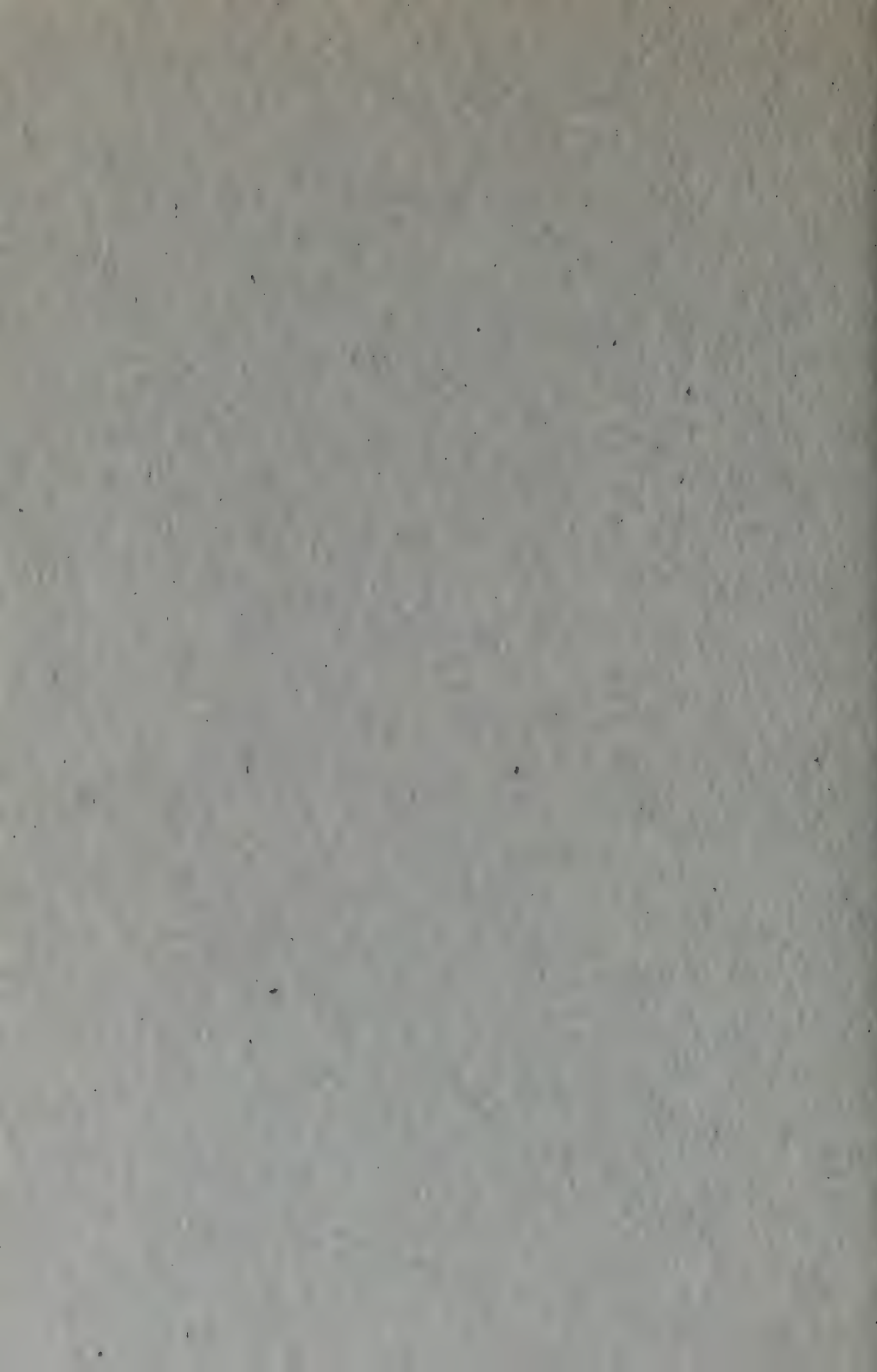
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**Brief for Defendants in Error**

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**GRAVES, KIZER & GRAVES,**  
Spokane, Washington  
*Attorneys for Defendants in Error.*

FILED  
JUL 2 1921



IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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R. E. HUSTON and CLARA S. HUSTON,  
*Plaintiffs in Error,*

*vs.*

THE BIG BEND LAND COMPANY,  
E. T. HAY and J. C. McCAUSTLAND,  
*Defendants in Error.*

No. 4108

*Upon Writ of Error to the United States District  
Court of the Eastern District of Washington*

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Brief for Defendants in Error

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GRAVES, KIZER & GRAVES,  
Spokane, Washington  
*Attorneys for Defendants in Error.*



Note. To avoid confusion, we shall refer to the plaintiffs in error as Huston, to the defendant in error Big Bend Land Company as the Land Company, and to the individual defendants in error, who were sureties on the bond in suit, as the Sureties.

## I. Simplification of Issues.

Much of Huston's brief is taken up with a discussion of matters which are wholly irrelevant to this case, and we shall put them out of the way before discussing what is relevant.

(1) The Land Company brought an unlawful detainer action against Huston in a state court of Washington, and to obtain possession of the land involved prior to judgment, gave bond as required by the Washington statute. Huston sues upon that bond. In the unlawful detainer action, the Supreme Court of Washington held that the lower court, which had entertained the action and given judgment in favor of the Land Company, was without jurisdiction of the action, and had no power to do anything but dismiss it. *Big Bend Land Company v. Huston*, 98 Wash., 640, 168 Pac., 470. Upon remand of the cause, Huston moved the lower court to dismiss the action not only, but also to restore to him possession of the land involved, from which he had been ousted by a writ of restitution. The lower court refused to make any order but one dismissing the action, and upon mandamus brought by Huston, the Supreme Court sustained the lower court in that position. This upon the ground that



the lower court had never acquired jurisdiction over the action; that the situation was the same as though no attempt had been made to begin an action, and the Land Company had taken possession of the land by force; and that the courts possessed no power over the action, or what had been done therein, save to clear their records of what purported to be, but was not, an action. To quote:

“The situation of the relators, in so far as present rights of action and remedies are concerned, is the same as if the Big Bend Land Company had, without beginning suit at all, gone upon the land in controversy and forcibly removed the relators therefrom. The relators have been denied no remedy. They may bring an action for any relief to which they may conceive themselves entitled.”

*State ex rel. Huston v. Big Bend Land Co.*,  
100 Wash., 425, 171 Pac., 259.

Now, Huston argues at considerable length that the foregoing decision was erroneous. This Court will not, of course, consider that question. The Supreme Court of Washington had the power to decide what was the nature and effect of the proceeding before it. If in so deciding it violated any right secured to Huston by the laws of the United States, he could have had remedy in the Supreme Court of the United States. But now, in this and every other court, it is settled that the bond sued on was given in, and as a part of, a cause over which the court in which it purported to be brought

had no jurisdiction, and, consequently, that in the eye of the law no such cause ever existed. It is for this Court to decide how that situation affects Huston's right of action on the bond. In deciding that question, however, it cannot inquire into the propriety of the decisions of the state courts in the previous litigation. The matters there decided have passed into the realm of things adjudicated, and are beyond the reviewing power of any court.

(2) It is urged that if Huston has no right of action on the bond in suit, he is without remedy for the injury he alleges has been done him. If that were true, it would go far toward establishing his right of action, for certainly the law does not intend that any man shall be without remedy for legal wrong done him. But it is not true. Huston had at least two other remedies if any legal wrong was done him by his eviction. In the first place, he had a remedy against the Land Company, irrespective of the bond. If the allegations of his complaint are true, the Land Company wrongfully obtained possession of his property by the use of void process, the execution of which it procured by the action of a court without jurisdiction. The Land Company was therefore a trespasser *ab initio*, and was liable to Huston for any damage done him by the trespass. Cf. in analogous case of attachment, 6 Corpus Juris, pp. 493-94, §§1162-64. In the second place, the sheriff who executed the writ of restitution and his bondsmen were liable. An officer

is not protected by process issued by a court without jurisdiction. *Wise v. Withers*, 3 Cranch, 331 *Dynes v. Hoover*, 20 How., 65, 35 Cyc., 1740. It is true that where process is issued by a court of general jurisdiction, and the process shows apparent jurisdiction in the particular case, the officer executing it is protected. But here the sheriff served the summons and all other process in the case. *Big Bend Land Co. v. Huston*, 98 Wash., 640, 641-42. Knowing the law, as he must be presumed to, he knew that the necessary steps had not been taken to invest the court with jurisdiction. Furthermore, if process is issued by a court of general jurisdiction, but in a matter which is not appurtenant to its general jurisdiction, as where its authority to act is special and statutory, the officer cannot justify under the process alone, but must show that the statutory requirements for the exercise of jurisdiction have been complied with. 35 Cyc., 1742. The superior courts of Washington are courts of general jurisdiction, but such courts, when acting in forcible entry and unlawful detainer proceedings, "exercise a special, statutory, and extraordinary power and stand upon the same footing and are governed by the same rules as courts of limited and inferior jurisdiction." Accordingly, there is no presumption in favor of the record, and the facts which give jurisdiction must affirmatively appear on the face of the record, otherwise the proceedings are not voidable merely, "but absolutely void, as being *coram non judice*." 26 Corpus Juris, p. 843, §92. See also the

language used in the first Huston Case (98 Wash., 643), and in *State ex rel. Seaborn Co. v. Superior Court*, 102 Wash., 215 (172 Pac., 826), where it was said that in unlawful detainer or forcible entry and detainer cases, the court "having jurisdiction only by virtue of a strict compliance with a special statute, was, to all intents and purposes, sitting as a special tribunal, \* \* and was not sitting as a court with general legal or equitable jurisdiction."

Huston, then, had ample remedy for any legal wrong done him. He had a right of action against the Land Company alone, against the sheriff and his bondsmen, or against the Land Company and the sheriff. Denial of his right of action upon the bond in suit does not mean the denial of any remedy to him, but merely means that he has passed over the ample remedies that he certainly had to pursue a remedy that he is not entitled to. The situation is summed up in the closely analogous case of *Caffrey v. Dudgeon*, 38 Ind., 512, 521, where it was said:

"The conclusion that we have reached does not deprive the appellant of a remedy, for the justice of the peace who issued the writ, the plaintiff in that action who procured him to issue it, and the officer who served it, if the want of jurisdiction appeared on the face of the writ, were trespassers, and as such are liable for the consequences of their wrongful and illegal acts."



## II. No Right of Action on the Bond.

Counsel are guilty of two fundamental errors in presenting Huston's claim that he has a right of action on the bond. They assume that the sole question is whether there was a consideration for the bond, and they fail to distinguish between the legal principles which give Huston a right of action against the Land Company independent of the bond, and those which govern when recovery is sought from the Sureties by an action on the bond. Those errors render their argument and authorities inapplicable.

There are several viewpoints from which the case may be considered, from any of which Judge Rudkin's decision is seen to be right. Our principal position, however, is this: No recovery can be had on the bond as a statutory bond because of failure of jurisdiction in the unlawful detainer action. There can be no recovery on it as a voluntary bond, because that would be to impose upon the Sureties different obligations from those which they assumed when they executed the statutory bond.

Before turning to the authorities, let us briefly review the facts upon which the position above stated depends.

The bond was given under §819, Remington's Comp. Statutes 1922, which reads as follows:

“The plaintiff, at the time of commencing an action of forcible entry or forcible detainer or unlawful detainer, or at any time afterwards, may apply to the judge of the court in which



the action is pending for a writ of restitution restoring to the plaintiff the property in the complaint described, and the judge shall order a writ of restitution to issue. The writ shall be issued by the clerk of the superior court in which the action is pending, and be returnable in twenty days after its date; but before any writ shall issue prior to judgment the plaintiff shall execute to the defendant and file in court a bond in such a sum as the court or judge may order, with two or more sureties, to be approved by the clerk, conditioned that the plaintiff will prosecute his action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out."

By reference to the complaint (record, 2), and the opinion in the first Huston Case (98 Wash., 640), it will be seen that the complaint was filed, the bond in suit was executed and delivered, and the writ of restitution was issued, on the same day: March 4, 1915. The wrong complained of, Huston's eviction under the writ of restitution, was done six days later, on March 10th. It was not wrongful because of anything done before or at the time of the delivery of the bond and the issuance of the writ of restitution, but because of the subsequent failure to perfect the court's jurisdiction. Because of this, as we read in the 98 Washington, "there was never a time when the court had jurisdiction of both the person and the subject matter simultaneously," and the plaintiff's (Land Company's) position was lik-

ened to that of one who "had forcibly ejected defendants from the premises." This similitude was emphasized in the 100 Washington, where, holding that the court could not, in the instant action, restore Huston to the possession he had given up under the void writ, it was said that the situation was the same as if the Land Company "had, without beginning suit at all, gone upon the land in controversy and forcibly removed (Huston) therefrom." In other words, the Land Company was a naked trespasser when it evicted Huston and took possession of the premises in dispute.

Now, two things are obvious. The first is that the Sureties intended to be responsible only for proceedings *coram judice*. The bond was given in a pending action, and it cannot be claimed that they intended to respond for their principal's acts quite beyond the scope of that action, *e. g.*, for his abandonment of the action and forcible seizure of the property in dispute without color of right or justification under the action. A surety might well be willing to stand good for another's acts done under lawful process, yet refuse to respond for what the same person might see fit to do under void process, acting beyond the jurisdiction of the courts. The second is that to hold the Sureties for the wrong complained of is to enlarge the conditions of the bond. The bond is conditioned as required by statute; that the principal should prosecute the action without delay, pay all costs adjudged to the de-

fendants, and all damages sustained by the wrongful suing out of the writ. Huston alleges no breach of any of those conditions. The writ was rightfully issued, in strict compliance with the statute. The breach alleged is that the writ was wrongfully executed, in that the court was without jurisdiction of the cause when it was executed. To hold the Sureties liable for their principal's acts after the court had lost jurisdiction of the cause is to enlarge the liability they intended and agreed to assume.

The authorities sustain the positions above taken. In *Conant v. Newton*, 126 Mass., 105, one Sanderson was appointed trustee of an estate by a probate court, and gave bond in an amount fixed by the court. The probate court had no jurisdiction over the matter. Sanderson continued as trustee for some ten years, when he resigned. He had converted to his own use or wasted the greater part of the estate, and suit was brought on his bond. It was held that as all the proceedings were *coram non judice*, the suit could not be maintained as one on a probate bond. Then the plaintiff insisted that it was valid as a common law bond. It was held otherwise. The bond, it was said, was given with the understanding and belief that the probate court had jurisdiction, and that the estate would be administered by that court according to law. Since the court did not have the power to supervise and control the trustee, compel accountings, etc., "it was legally impossible to perform the conditions of the bond according to its

true spirit and meaning." The conclusion of the Court was summed up in these words:

"In order to hold the defendants liable as on a bond at common law, we must treat this bond as if its condition was solely that Sanderson should faithfully manage and pay over the estate in his hands to the person entitled to it. But this was not the obligation which the defendants intended or consented to assume. They intended to become liable as sureties for one who was under the jurisdiction of the Probate Court, and who in administering the estate must conform to the rules and practice of that court. To hold them bound as upon a voluntary contract to be responsible for a trustee not subject to the jurisdiction of the Probate Court would be to change the character of their contract and to increase their liability."

That language is applicable here. To become surety for one who proceeds according to law, using lawful process and acting within the court's jurisdiction, is one thing. To become surety for one who abandons an action he has begun, resorts to the use of void process, and acts without the jurisdiction of the court, is quite another thing. In illustration: The superior court, having sustained the proceedings in the unlawful detainer action as within its jurisdiction, tried the action on its merits, and rendered judgment for the plaintiff (Land Company). Presumably, therefore, it was entitled to possession of the land. But its manner of securing possession of the land was, as the Supreme Court held, equivalent to taking forcible possession of the land with-



out beginning suit at all. The Sureties intended and consented to assume liability only for what was done in the action which was begun when they executed and delivered the bond, and not for what their principal might do independently, in excess of the court's jurisdiction, and without authority from it. They intended, in other words, to become liable for what was done *coram judice*, but not for what was done *coram non judice*. They cannot be held upon a statutory bond, and to hold them as upon a voluntary bond would, in the language of the Massachusetts court, "be to change the character of their contract and to increase their liability."

Of related facts and to the same effect as the Conant Case are *Thomas v. Burrus*, 23 Miss., 550, *Crum v. Wilson*, 61 Miss., 233, and *Justices v. Selman*, 6 Ga., 432. Of unrelated facts but to the same effect is *Kuhl v. Chamberlin* (Ia.), 118 N. W., 776. In the latter case a banker gave a bond to a county treasurer which recited that the banker had been appointed a depository of county funds, and undertaking that he would account as such for the funds deposited with him. He was never appointed a depository of county funds, but the treasurer nevertheless deposited such funds with him. A loss was sustained, and it was attempted to hold the sureties as on a common law bond, it being conceded that there could be no recovery as on a statutory bond because the banker had never been appointed a depository. It was held that there could be no re-



covery, because the liability of the sureties on a common law bond would be different from their liability upon the statutory bond which they intended to execute.

Another viewpoint is presented by a line of cases typified by *Caffrey v. Dudgeon*, 38 Ind., 513. That case is, in all its features, singularly like the case at bar. Dudgeon began a replevin action before a justice of the peace, gave bond, and by means of a writ of replevin obtained possession of the property in dispute. The justice was without jurisdiction of the action, and on motion of the defendant the action was dismissed, the justice ordering a return of the property. Dudgeon refused to return it, whereupon an action on the bond was instituted. The defendants, Dudgeon and his sureties, demurred to the complaint, the objection urged being that it appeared that the justice "had no jurisdiction of the action of replevin, and that consequently the bond was illegal and void." The demurrer was sustained, and on appeal the ruling was upheld. The opinion is too long to permit of quotation. Suffice it that the conclusion of the Court was that "as the authority to approve a bond and issue a writ in replevin is conferred solely and exclusively by statute, it necessarily and unavoidably results that if the justice of the peace had no jurisdiction of the cause, the bond must be void," sustaining the conclusion by the citation of a number of cases. It was also said that: "The bond must be valid under

our statute, or it will be void. Justices having no civil jurisdiction at common law, it cannot be sustained as a common law obligation."

As may be gathered from the above excerpts, emphasis was placed in the above cited opinion upon the fact that the justice exercised a limited jurisdiction, unknown to the common law, and wholly dependent upon statute. Precisely the same condition exists here. An unlawful detainer action is "in derogation of the common law," the "statute conferring jurisdiction must be strictly pursued," and if it is not "jurisdiction will fail to attach and the proceeding will be a nullity" (98 Wash., 643). The court "having jurisdiction only by virtue of a strict compliance with a special statute," sits "as a special tribunal," and not "as a court with general legal or equitable jurisdiction" (102 Wash., 217). The similitude in all respects of the Caffrey Case to the case at bar makes it a compelling authority.

Other replevin cases to the same effect are *Robinson v. Bonjour* (Col.), 66 Pac., 451, and *McBrayer v. Jordan* (Neb.), 103 N. W., 50. An attachment case proceeding on the same principle is *Benedict v. Ray*, 2 Cal., 251.

Finally, there was no consideration for the bond. It was given to procure the exercise of the court's jurisdiction to put the Land Company in lawful possession of the land in dispute. It failed of its

purpose. The jurisdiction of the court was not evoked, and lawful process, which would protect the user of it, was not obtained. The lower court, the only court that considered the merits of the unlawful detainer action, held that the Land Company was entitled to possession of the land in dispute. Its failure to get lawful possession of it was due to the failure of the court's jurisdiction. The bond, therefore, did not accomplish the purpose for which it was given, and consequently its consideration failed.

The case of *Davis v. Huth*, 43 Wash., 383, 86 Pac., 654, is squarely in point. Judgment was recovered against several defendants. Some of them attempted to appeal, and gave an appeal and supersedeas bond to perfect the appeal and stay execution of the judgment. They failed to serve their codefendants with notice of appeal, and the Supreme Court dismissed the appeal for want of jurisdiction. It was held there could be no recovery on the bond; that it was given solely to effect an appeal, and as it had failed in that purpose, it was without consideration. To quote (43 Wash., 386):

“The jurisdiction of this court on appeal was the whole consideration for the bond sued on in this case. There was no other consideration, and since that jurisdiction failed by reason of no notice or an insufficient notice, as we held it was in *Davis v. Tacoma & Power Co.*, 35 Wash., 203, 77 Pac., 209, the consideration for the bond failed and no recovery can be had upon it.”

And so here. The sole consideration for the bond in suit was the exercise of the court's jurisdiction to put the Land Company in possession of the land. As that jurisdiction was not exercised, the consideration of the bond failed.

We pause to remark upon distinctions which have been and may be attempted of the above case.

(a) It is said in Huston's brief that in the Davis Case the sole consideration for the bond was the evocation of the jurisdiction of the Supreme Court, while here the jurisdiction of the court did not depend on the bond. That is mere quibbling. The bond in the Davis Case was one of the instruments by which it was sought to secure the exercise of the jurisdiction of the Supreme Court to hear the appeal. The bond here was one of the instruments by which it was sought to secure the exercise of the jurisdiction of the Superior Court to put the Land Company in possession of the land. In both cases the bonds failed to effect their purpose because of the failure of the principals to take steps necessary to an exercise of the desired jurisdiction. If the consideration failed in the one case, it certainly did in the other.

(b) It seems to be thought that the Sureties cannot plead that the consideration for the bond failed, inasmuch as the failure to procure an exercise of the court's jurisdiction was due to the omissions of their principal, the Land Company. The



same condition was present in the Davis Case. The failure of consideration there was due to the omission of the sureties' principals, the appellants, to serve notice of appeal on their co-defendants.

(c) It may be argued that by giving the bond the Land Company got possession of the land, and that this constituted a consideration. The fault is in the premise. It was the sheriff's wrongful act, not the giving of the bond, that enabled the Land Company to get possession of the land. The filing of the complaint, the giving of the bond, and the issuance of the writ of restitution, were all lawful acts, and of them no complaint can be made. The sheriff, however, executed the writ without serving a summons upon Huston, and in doing so acted without process, because the court had no jurisdiction. In no legal sense can the giving of the bond be said to have been cause for that wrongful act. If we indulge in speculation, we may surmise that a writ of restitution would not have issued if a bond had not been given, and that the sheriff would not have put the Land Company in possession if no writ of restitution had been issued. But legally there is an impassable gulf between the lawful things which were done within the court's jurisdiction, and the unlawful things which were done without it. The giving of a bond to procure the issuance of a valid writ, with intent that it should be lawfully executed, is not the legal cause for its un-



lawful execution, when the court has lost or never acquired jurisdiction.

Furthermore, however the matter might stand between Huston on the one hand, and the sheriff and the Land Company on the other, as against the Sureties the bond cannot be said to be the cause for the sheriff's wrongful act in putting the Land Company in possession. The situation may be likened to that where there is abuse of process. If a valid writ is placed in an officer's hands, without direction as to the manner of its execution, he alone is liable for its misuse. It is only when the plaintiff advises or assists in abuse of the process, or subsequently ratifies the officer's acts, that he also may be held. 1 R. C. L., p. 111, §16, 32 Cyc., p. 543, subd. E. There is no suggestion that the Sureties assisted in, advised, or even knew of the unlawful use of the writ. They executed a bond for the purpose of procuring a lawful writ, intending that it should be lawfully used to put the Land Company in possession. That the writ was afterwards perverted, and used for an unlawful purpose without their consent or knowledge, certainly does not, as against them, clothe the bond with a consideration. To put in shortly, they executed a bond to invoke an exercise of the court's jurisdiction. The consideration of the bond failed because the jurisdiction was not exercised. It cannot, as against them, be invested with a different

consideration because of the unlawful use made of the writ without their knowledge.

It should be remarked that much the same argument for a consideration was made in the Davis Case, and was thus disposed of:

“Counsel for appellant say, however, that the bond served the purpose of a supersedeas until the cause was dismissed by this court, and that therefore there was a consideration. The fact that the appellants in this action did not take out an execution on their judgment while the supersedeas bond was on file does not give them a cause of action on the bond. The bond was a supersedeas on account of the appeal, and for no other reason or purpose. The bond became ineffective. Each depended upon the other. When no notice was given, the bond never became effective and did not supersede the judgment. Execution might have been taken out at any time. There was no consideration for the bond, and the lower court properly sustained a demurrer upon this ground.”

The writ in the present case was like the notice of appeal in the cited case. Both were ineffective because the courts did not obtain jurisdiction. If the bond fell with the process in the one case, it must likewise have fallen in the other.

Another apposite case is *Couchman v. Lisle* (Ky.), 33 S. W., 940. Contestants of a will appealed, and moved for the appointment of a curator to take charge of the property involved pending the appeal. The court appointed a curator, but required the appellants to give a bond as a condition to

such appointment. It was conceded that the bond was not a statutory bond, but it was insisted that it was a valid common law obligation, upon a sufficient consideration, because thereby the appellants had procured the appointment of a curator. It was held otherwise, the court saying: "But it seems to us that the court had no authority to appoint a curator. Hence, the bond was executed without authority of law, and is therefore not obligatory."

In *Powers v. Chabot* (Cal.), 28 Pac., 1070, the syllabus is as follows:

"The statutory undertaking given on appeal will operate as a stay of execution; and, where another undertaking is given for the purpose of staying the execution, it is without consideration, and cannot be enforced, either as a statutory or common law obligation, against the sureties thereon, though the judgment was for the foreclosure of a chattel mortgage on perishable property, and the obligee, relying on such undertaking, refrained from disposing of such property pending the appeal, and was thereby damaged, as the statutory undertaking did not contemplate a stay of sale of the property."

See also the syllabi in *Roystone Co. v. Darling* (Cal.), 154 Pac., 15, one paragraph of which is as follows:

"A bond given solely to comply with a statute which is itself void, or which does not require the bond as supposed, is without binding force."

Other cases denying recovery upon bonds given to procure the exercise of jurisdiction, where they fail to effect their purpose because of want of jurisdiction, are *Steele v. Crider*, 61 Fed., 484, *U. S. v. Morris*, 153 Fed., 240, and *Pike v. Neal*, 73 Maine, 513.

We turn now to another class of cases, of which *Pacific National Bank v. Mixter*, 124 U. S., 721, is typical. In actions against a national bank, attachments were levied on its property. There was no statute authorizing the levy of attachments on the property of a national bank, and the attachments, consequently, were invalid. Without raising that question, however, the bank gave bonds, in accordance with the state practice, for the dissolution of the attachments. The bank's receiver subsequently brought suit to cancel the bonds, and for a return of securities pledged to indemnify the sureties thereon, and was granted the relief prayed. The bond involved was not a statutory bond, the Supreme Court said, because there was no law authorizing the levy of an attachment on the property of a national bank, and consequently "there could be none for taking the bond" to dissolve the attachment. Of its enforceability as a common law bond, the Court said (p. 729):

"Neither is the bond binding as a common law bond. If the attachment had been valid, and the bond taken had not been in all respects such as the statute had required, it could nevertheless have been enforced as a common law



bond, because it was executed for a good consideration, and the object for which it was given had been accomplished. But here the difficulty is that there was no lawful attachment, and therefore no lawful authority for taking any bond whatever. The bond is consequently neither good under the statute nor at common law, because there is no sufficient foundation to support it."

Let us apply that decision to the present case. Under the Washington law, one in possession of realty cannot be dispossessed save by means of a valid writ, issued and executed in a pending action in a court having jurisdiction of the matter. Any other mode of eviction is necessarily unlawful. Now, if the Land Company, without going through the form of beginning an action and procuring a writ of restitution, had given a bond to induce the sheriff to evict Huston and put the Land Company in possession, and the sheriff, without color of authority, had done so, it is evident there could be no recovery on the bond. Like the attachment in the cited case, there was no authority in law for the dispossession, and there could be none for taking the bond. So it would need be said, as in the cited case, that "The bond is consequently neither good under the statute or at common law, because there is no sufficient foundation to support it." The actual case is as strong as the hypothetical. Under the decisions of the Supreme Court in the 98 and 100 Washington, the beginning of the action and the issuance of the writ of restitution advant-



aged the Land Company nothing. The proceeding being special, before a court of special and limited jurisdiction, no step could be taken unless jurisdiction was preserved. Here the jurisdiction failed, and Huston's dispossession was effected by void process. The situation, said the Supreme Court, was as though the Land Company "had, without beginning suit at all, gone upon the land in controversy and forcibly removed (Huston) therefrom." We submit that the Pacific National Bank Case is controlling.

Other cases of like effect are *Florrance v. Goodin*, 5 B. Mon., 111, *American Exchange Bank v. Cook* (Kan.), 51 Pac., 65, and *Planters' Bank v. Berry* (Ga.), 18 S. E., 137.

We submit that, from whatever viewpoint considered, there can be no recovery on the bond in suit. It was given for a lawful purpose: to procure the proper exercise of jurisdiction by a court: to effect a lawful dispossession by the use of lawful process. The Sureties did not intend or consent that it should be perverted to an unlawful purpose. It failed to accomplish the purpose for which it was given because the court, whose action it was intended to move, did not have jurisdiction to act. The Sureties are now sought to be held because the sheriff and their principal abused the process of the court and committed an unlawful act. The Sureties did not assent to or know of their illegal conduct, and every rule of law and morals forbids

that they shall be held liable therefor. The Land Company is independently liable for its misconduct. The sheriff and his bondsmen are liable for his illegal act, for his bondsmen undertook that he should properly discharge the duties of his office. The Sureties, however, did not become liable for the good conduct of their principal. They only assumed responsibility for the Land Company's failure to make good its case before a court of competent jurisdiction. They assumed no liability for its independent wrong; for its abandonment of the action in which the bond was given, and its taking of the law into its own hands, and, with the aid of the sheriff, dispossessing Huston without color of right. For any injury which Huston may have suffered from that unlawful act, he must look for recompense to the Land Company and the sheriff. The Sureties are neither legally nor morally responsible therefor.

### **III. Authorities Cited in Huston's Brief.**

The authorities cited by Huston require no discussion or distinction. In the greater number of them, the validity of the bonds sued on was challenged because of mere irregularities in the bonds or in the proceedings in which they were given. They were, unquestionably, rightly decided, for, as the Supreme Court said in the Pacific National Bank Case (124 U. S., 728), "The sureties on a bond of this kind are estopped from setting up, as a defence to an action for a breach of its condi-

tion, any irregularities in the form of proceeding.” Some of the authorities go further, however, and hold that under appropriate conditions, the sureties may be estopped to set up want of jurisdiction in the court in which the bond was given. These need brief remark, and we select for that purpose *Hine v. Morse*, 218 U. S., 493 (cited in Huston’s brief as *U. S. v. Morse*, 218 U. S., 511), for it goes as far toward sustaining Huston’s position as any of the authorities cited.

It appears in the Hine Case that suit was brought in the Supreme Court of the District of Columbia, seeking an order of sale of a minor’s realty for the purpose of reinvestment. The suit was heard, and an order was entered directing the sale, appointing a trustee to make it, and fixing the bond that he should give. The bond in suit was given in compliance with the order. It was entitled in and referred to the suit in which the order was made, recited the appointment of the trustee to make the sale, and undertook that he should faithfully discharge his duties as such trustee, and obey such orders as the court might make. It was assigned as breach of the bond, that the principal named therein had assumed the duty and function of trustee for sale of the property, had made the sale as directed and received the proceeds, but had disobeyed an order requiring him to pay such proceeds into court, and had misappropriated the same. The defense was that the Supreme Court of the District did not

have power to order the sale of an infant's property for the purpose of reinvestment. This the Supreme Court doubted, but held that in any event the sureties were estopped to deny the validity of the sale: estopped by the recitals of the bond, and estopped by the fact that, through their execution of the bond, the trustee was enabled to make the sale and receive its proceeds.

We do not question the soundness of the decision, but are unable to discover its applicability to the present case. Here the complaint was filed, the bond executed and delivered, and the writ of restitution issued, on the same day: March 4th. The bond contained no recitals to estop the sureties. It recited that an action had been begun, and there had; it was begun by the filing of the complaint. It recited that a writ of restitution had been issued, and there had. It was lawfully issued, because the statute provides that upon giving a bond the writ may issue when the action is begun. In those acts, recited in the bond, there was nothing wrongful, nothing of which Huston could complain. The wrongful act, whereon Huston's right of action rests, if any he have, was committed on March 10th, when the Land Company, without taking the steps necessary to give the court jurisdiction to act, induced the sheriff to dispossess Huston. But that was an independent wrong, as much outside the scope of the action as though no action had been begun, for so said the Supreme Court in holding that the



situation was the same as though the Land Company, without beginning any action, had forcibly evicted Huston. By executing the bond in suit, the Sureties did not become liable for the Land Company's independent wrongs, committed *coram non judice*. Had the court been invested with jurisdiction, and the writ been lawfully executed, the Sureties would have been liable for any damage suffered by Huston if the Land Company had failed to prove its right to possession, for the condition of the bond is that the Sureties will pay any damages sustained "by reason of the issuance of such writ should the same be wrongfully sued out." Record, p. 3. But here the writ, it seems, was rightfully sued out, for the superior court, hearing the action on its merits, held that the Land Company was entitled to possession of the land. The condition to respond for damages caused by the wrongful suing out of the writ, cannot be extended to cover liability for subsequent wrongful acts which are independent of it.

The situation here is the converse of what it was in the Hine Case. There the order which was alleged to be beyond the jurisdiction of the court had been made, and the bond in suit was given for the purpose of carrying it into effect. Presumptively, the sureties knew the law then as well as they did thereafter, and if they did not wish to participate in a void proceeding, should have refused to execute the bond which was necessary to



carry it into effect. They knowingly made themselves parties to the proceeding, they intentionally aided in carrying it out. They were rightly held estopped to question its validity after others had suffered injury by their acts. Here nothing unlawful had been done when the Sureties executed and delivered the bond. All they did was in aid of the unquestioned jurisdiction of the court. They neither consented to nor knew of the subsequent illegal act by which Huston was dispossessed, and of course cannot be considered to have participated therein. It is idle to talk of their being estopped to question the validity of that act, and manifestly they cannot be held unless it is said that by executing the bond they became liable for any independent wrong committed by their principal, albeit the act was entirely beyond the scope of the action.

Let us make this suggestion. If the wrong which was done under color of the writ reverts back and renders the writ wrongful in its inception, then the judge who ordered it to issue, and the clerk of the court who issued it, are as much liable to Huston as are the Sureties. The Sureties' acts in furtherance of the issuance of the writ were as innocent as those of the judge and clerk; no more injury was done Huston by the Sureties' acts than by the acts of the judge and clerk. The only wrong done Huston was in the unlawful use of the writ after it got into the hands of the Land Company and the sheriff, and for that wrong the Sureties were no

more responsible than were the judge and clerk.

Again: An individual who sets a lawful writ in motion is not liable for its unlawful use, provided he has not participated in or ratified its abuse. *Vide* authorities cited under preceding head. On what theory can the Sureties be held for the illegal acts of the Land Company and the sheriff? Their responsibility for their principal extended no further than to his proceedings in the action, and there is no rule of law or principle of estoppel to hold them for his wrongs independent of the action; for his acts done without the jurisdiction of the court.

The circumstances surrounding the execution and delivery of the bond in suit do not permit invocation of the doctrine of estoppel against the Sureties. That being so the authorities cited in Huston's brief are inapplicable, and the Sureties cannot be held liable for the independent wrongs of their principal.

Respectfully submitted,

GRAVES, KIZER & GRAVES,

*Attorneys for defendants in Error.*

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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QUAN YUEI LEN,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration  
for the Port of San Francisco,

Appellee.

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**Transcript of Record.**

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Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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QUAN YUEI LEN,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration  
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Appellee.

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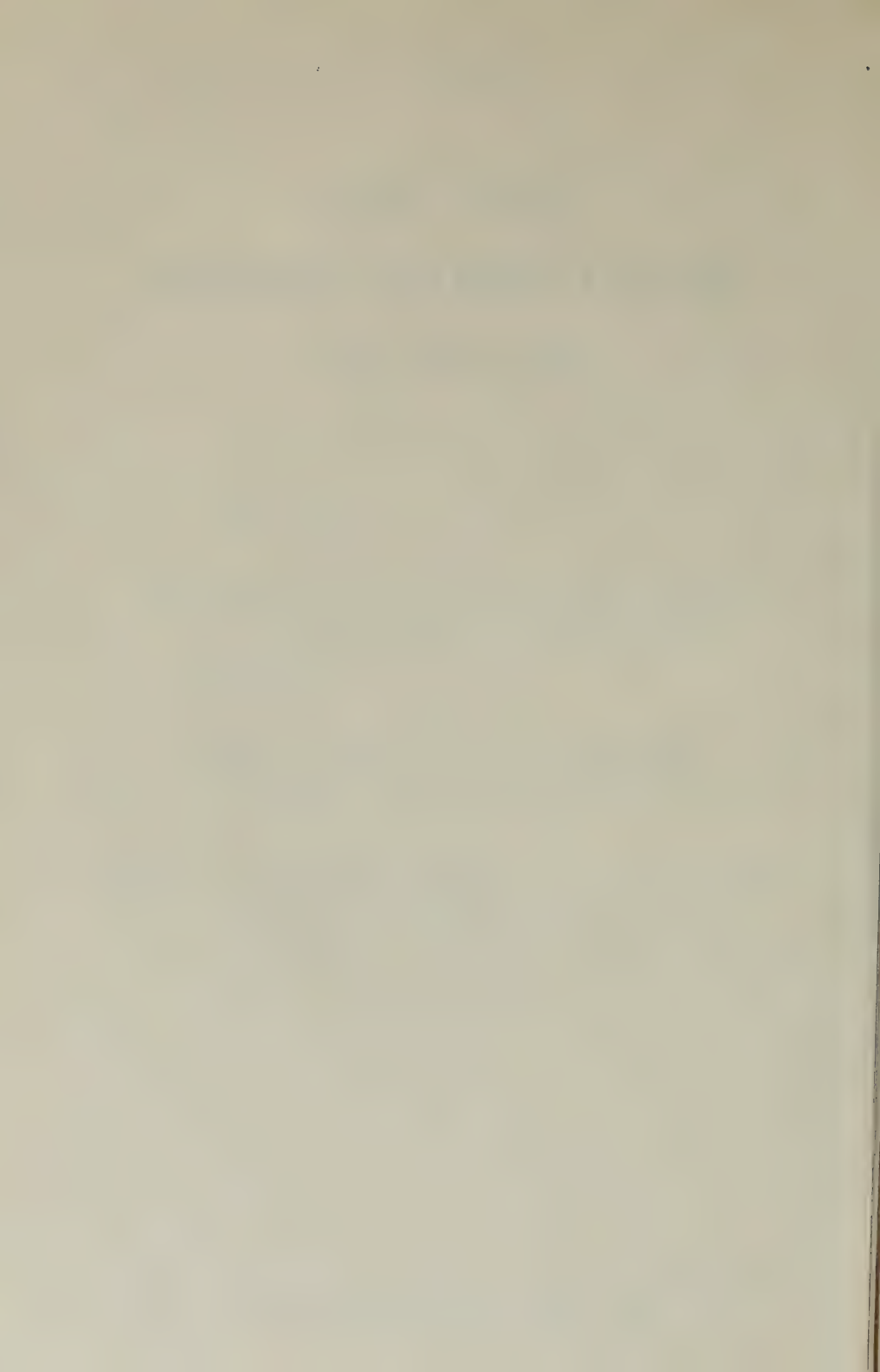
**Transcript of Record.**

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Upon Appeal from the Southern Division of the  
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Second Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## **Names of Attorneys of Record.**

For Petitioner and Appellant:

ALFRED L. WORLEY, Esq., and LOUIS  
GOLDBERG, Esq., San Francisco, Calif.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Fran-  
cisco, Cal.

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In the Southern Division of the United States Dis-  
trict Court in and for the Northern District of  
California, First Division.

No. 17518.

In the Matter of QUAN YUEI LEN on Habeas  
Corpus.

### **Praeceptum for Transcript on Appeal.**

To the Clerk of said Court:

Sir: Please make transcript of appeal in the  
above-entitled case, to be composed of the following  
papers, to wit:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Demurrer to petition for writ of habeas corpus.
4. Minute order of July 15th, 1922.
5. Opinion and order overruling demurrer to peti-  
tion and directing writ to issue.
6. Writ of habeas corpus.
7. Order and judgment dismissing writ of habeas  
corpus and remanding petitioner.

8. Substitution of attorneys for petitioner.
9. Notice of appeal.
10. Petition for appeal.
11. Assignment of errors.
12. Order allowing appeal.
13. Citation on appeal.
14. Stipulation and order respecting immigration record.
15. Clerk's certificate.

WORLEY & GOLDBERG,  
Attorneys for Petitioner.

Service of the within praecipe for transcript on appeal and receipt of a copy thereof is hereby admitted this —— day of August, 1923.

JOHN T. WILLIAMS,  
U. S. Attorney for Appellee.

[Endorsed]: Filed Aug. 9, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.

[1\*]

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In the Southern Division of the United States District Court for the Northern District of California.

No. (17518.)

In the Matter of QUAN YUEI LEN, 13-4 Ex. SS.  
“Nanking,” October 14, 1921, on Habeas Corpus.

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\*Page-number appearing at foot of page of original certified Transcript of Record.



**Petition for Writ of Habeas Corpus.**

To the Honorable United States District Judge  
now presiding in the above-entitled Court:

It is respectfully shown by the petition of H. Embert Lee that Quan Yuei Len, who is hereinafter in this petition referred to as the "detained," is unlawfully imprisoned, detained, confined and restrained of his liberty by Edward White, Commissioner of Immigration for the Port of San Francisco, at the United States Immigration Station at Angel Island, county of Marin, within the Southern Division of the United States District Court in and for the Northern District of California, and the said imprisonment, detention, confinement, and restraint are illegal, and that the illegality thereof consists in this, to wit:

That the said detained is a Chinese person subject to and entitled to admission into the United States under the terms and provisions of the acts of Congress of May 6, 1882, July 5, 1884, November 3, 1893 and April 29, 1902, as amended and added to by Section V of the Deficiency Act of April 7, 1904, which said acts are commonly known and referred to as the Chinese Exclusion Laws; that said detained is the lawful minor son of Quan Sing;

That said father of said Quan Yuei Len is a lawfully domiciled merchant, and is actively engaged in said mercantile occupation as a member of the firm of Quong Tsue Lung Company, 130 Southside Plaza, Los Angeles, California;

That said detained, as the lawful minor son [2] of said Quan Sing, made application to enter the United States, being incoming passenger No. 13-4 Ex. SS. "Nanking," which arrived at the Port of San Francisco, October 14, 1921; that, notwithstanding the admitted fact of paternity as above set forth, said Commissioner of Immigration and the Department of Labor did not admit said detained to land into the United States; that the illegality of such imprisonment, restraint, detention and confinement consists of this, to wit:

That, subsequent to his application to be admitted into the United States, the said Quan Yuei Len was refused and denied a fair hearing in good faith by the Secretary of Labor of the United States, by a manifest misuse of discretion committed to him by law, and through errors and mistakes of law, and against the spirit and letter of the law, and denied his right to enter the United States; and in this respect, your petitioner alleges:

(1) That the said Quan Yuei Len made application to the Commissioner of Immigration at the Port of San Francisco for admission to the United States as the lawful minor son of Quan Sing, the father of said applicant and said domiciled merchant and said Commissioner of Immigration duly found that said relationship of father and son existed.

(2) That said Commissioner of Immigration also found that said applicant, Quan Yuei Len, was a minor son of Quan Sing;

(3) That said Commissioner of Immigration duly found that Quan Sing was a merchant and a member of the firm of Quong Tsue Lung Company, located at 130 Southside Plaza, Los Angeles, California, but said Commissioner of Immigration determined, as the sole basis for deciding against the admission of the applicant, that there was a large number of partners for the small amount of business transacted by said Quong Tsue Lung Company, and, therefore, determined that said [3] applicant should not be admitted into the United States;

(4) That, thereafter, an appeal from said Commissioner denying said application was taken by and on behalf of said Quan Yuei Len to said Secretary of Labor, and thereafter said Secretary of Labor affirmed said Commissioner's decision, denying said application for admittance to the United States;

(5) That said Quan Sing is actively engaged as a merchant in the establishment of said Quong Tsue Lung Company, 130 Southside Plaza, Los Angeles, California, and owns a large proportionate interest in said partnership; that he has been for many years last past engaged in said work and in said store, and has not been engaged in any other business or any other pursuit whatsoever; that said Quan Sing is a lawfully domiciled merchant, under and by virtue of the terms of Section 2, of the Act of November 3d, 1893, of the laws governing the admission of Chinese into the United States;

(6) That, heretofore, several members of said firm of Quong Tsue Lung Company, 130 Southside Plaza, Los Angeles, California, of which Quan Sing is a partner, have been allowed and permitted by the Department of Labor to bring in their minor sons and daughters by virtue of the status of fathers and as domiciled merchants, said father being engaged only in said business of the Quong Tsue Lung Company; that the said father, Quan Sing, was surprised by said decision of the Department of Labor because he was lulled into the belief, by a former decision of the Department in permitting the children of his partners to be landed; that the status of said partners of the firm of Quong Tsue Lung Company has been thoroughly established in the immigration records;

(7) That said Quan Sing has discovered evidence which he was unable to present at the hearing of said matter before the Bureau of Immigration, at Angel Island, California, and said Quan Sing believes that, if said evidence [4] had been presented at the original hearing, said applicant would have been duly admitted and landed as the minor son of said Quan Sing;

That said Quan Sing has employed A. P. Entenza, attorney at law, with offices in the Merchants Exchange Building, in the city and county of San Francisco, State of California, to present said newly discovered evidence to the Secretary of Labor at Washington, D. C., and that the said attorney is en route to Washington, D. C., where he expects to present said newly discovered evidence in person,



before said Department of Labor; that said attorney is entirely familiar with all the facts in the matter contained in the immigration records of applicant, and said attorney has stated that he verily believes that said newly discovered evidence is of great merit and that when presented and urged before said Secretary of Labor, said Secretary will reopen the case to accept said newly discovered evidence and correct the error committed, and that said matter, when so presented, will bring about said reopening and said rehearing of the applicant's case.

Your petitioner therefore alleges upon his information and belief that the rights, privileges, exemptions and immunities guaranteed to the detained Chinese aliens, by the treaty between the United States and China, have been infringed upon and he has been denied the same treatment of equality and impartiality which is freely accorded to aliens of whatsoever nationality who are of the Caucasian race.

Your petitioner, therefore, alleges upon his information and belief that the said Commissioner of Labor, which acted in the case of the said detained, has abused the official discretion committed to it, and that its refusal to admit the said detained into the United States was in excess of the authority committed to it by the said statutes, and was in abuse hereof. [5]

Your petitioner has not in his possession, nor under his control, a copy of the hearings or proceedings hereinbefore mentioned. Your petitioner al-



leges, however, that he has set forth herein the basic facts upon which the prayer for relief is made, but however, should the respondent desire to produce the immigration records appertaining to the case of the said detained, your petitioner stipulates that, upon their production, the said records may be considered with the same force and effect as if filed with this petition and as exhibits in support and explanation thereof.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner of Immigration, commanding him to produce the body of the said detained, together with the time and cause of his detention, before your Honor at a time and place to be therein specified, to the end that the cause of the detention of the said detained may be inquired into, and that he be relieved of restraint and that he may be discharged from custody and go hence without day.

Dated April 21st, 1922.

WALTER E. HETTMAN,

Attorney for Petitioner. [6]

State of California,

City and County of San Francisco,—ss.

H. Embert Lee, being first duly sworn, deposes and says:

That he is the petitioner; that he is a friend of said father, Quan Sing, named in the foregoing petition; that he is familiar with the facts therein contained; that he files this petition for and on behalf

of said father, because said father is now in the city of Los Angeles, State of California; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters he believes it to be true.

H. EMBERT LEE.

Subscribed and sworn to before me this 21st day of April, 1922.

[Seal]

O. A. EGGERS,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 21, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [7]

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In the Southern Division of the United States District Court for the Northern District of California.

No. (17518.)

In the Matter of QUAN YUET LEN, 13-4 Ex. SS.  
“Nanking,” October 14, 1921, on Habeas Corpus.

**Order to Show Cause.**

Upon reading and filing the verified petition of H. Embert Lee, praying for the issuance of the writ of habeas corpus,

IT IS HEREBY ORDERED, that Edward White, as Commissioner of Immigration at the port of San

Francisco, at Angel Island, be and appear before the above-entitled Court, Department No. One thereof, on Saturday, the 29th day of April, 1922, to show cause, if any he have, why a writ of habeas corpus should not issue in this matter and the petition granted as prayed, and this at the hour of 10 o'clock of said day; and

IT IS FURTHER ORDERED that said Quan Yuei Len be not removed from the jurisdiction of this Court until the further order of this Court; and

IT IS FURTHER ORDERED that a copy of this order be served upon said Edward White, or such other person having the said Quan Yuei Len in custody as an officer of said Edward White.

Dated April 21st, 1922.

WM. C. VAN FLEET,  
United States District Judge.

[Endorsed]: Filed Apr. 21, 1922. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [8]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17518.

In the Matter of QUAN YUEI LEN on Habeas Corpus.

**Demurrer to Petition for Writ of Habeas Corpus.**

Comes now the respondent, Edward White, Commissioner of Immigration, at the port of San Fran-

cisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JOHN T. WILLIAMS,  
United States Attorney.

BEN F. GEIS,  
Asst. United States Attorney.

[Endorsed]: Filed Jul. 15, 1922. W. B. Maling,  
Clerk. By Lyle S. Morris, Deputy Clerk. [9]

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At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 15th day of July, in the year of our Lord, one thousand nine hundred and twenty-two. Present, the Honorable MAURICE T. DOOLING, District Judge.

No. 17,518.

In the Matter of QUAN YUEI LEN, on Habeas  
Corpus.

**(Minutes of Court—July 15, 1922—Hearing on  
Demurrer.)**

This matter came on regularly this day for hearing on order to show cause as to the issuance of a writ of habeas corpus herein. W. E. Hettman, Esq., was present as attorney for petitioner and detained. P. A. Robbins, Esq., was present as attorney for and on behalf of Respondent, and presented and filed demurrer to petition, and all parties consenting thereto, it is ordered that the Immigration Records be filed as Respondent's Exhibits "A," "B" and "C" and that the same be considered as part of original petition. After argument by the respective attorneys, the Court ordered that said matter be and the same is hereby submitted. [10]

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At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 19th day of July, in the year of our Lord, one thousand nine hundred and twenty-two. Present, the Honorable MAURICE T. DOOLING, District Judge.

No. 17,518.

In the Matter of QUAN YUEI LEN, on Habeas  
Corpus.



**(Minutes of Court—July 19, 1922—Order Overruling Demurrer and Granting Writ.)**

Pursuant to opinion this day filed, it is ordered that the demurrer to petition for writ of habeas corpus be and the same is hereby overruled, and that the writ of habeas corpus issue, as prayed for, returnable July 29, 1922, at 10 A. M. [11]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,518.

In the Matter of QUAN YUEI LEN, on Habeas Corpus.

**(Opinion and Order Overruling Demurrer and Granting Writ.)**

WALTER E. HETTMAN, Esq., and SCRIVNER & HETTMAN, Attorneys for Petitioner.

JOHN T. WILLIAMS, Esq., United States Attorney, and BEN. F. GEIS, Esq., Assistant United States Attorney, Attorneys for Respondent.

**ON DEMURRER TO PETITION FOR A WRIT OF HABEAS CORPUS.**

The demurrer is overruled and the writ will issue as prayed for, returnable on July 29th, 1922, at 10 o'clock A. M.

July 19th, 1922.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Jul. 19, 1922. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [12]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,518.

In the Matter of QUAN YUEI LEN on Habeas Corpus.

**Writ of Habeas Corpus.**

The President of the United States of America, to the Commissioner of Immigration, Port of San Francisco, Calif., Angel Island, California,  
GREETING:

YOU ARE HEREBY COMMANDED that you have the body of the said person by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged, before the Honorable Maurice T. Dooling, Judge of the United States District Court for the Northern District of California, at the courtroom of said Court, in the city and county of San Francisco, California, on the 29th day of July, A. D. 1922, at 10 o'clock A. M., to do and receive what shall then and there be considered in the premises.

AND HAVE YOU THEN AND THERE THIS WRIT.

WITNESS, the Honorable MAURICE T. DOOLING, Judge of the United States District Court,

and the seal thereof, at San Francisco, California, in said District, on the 19th day of July, A. D. 1922.

[Seal]

WALTER B. MALING,  
Clerk,  
By C. W. Calbreath,  
Deputy Clerk.

WALTER E. HETTMAN,  
Attorney for Detained. [13]

**Return of Service of Writ.**

United States of America,  
Northern District of Calif.,—ss.

I hereby certify and return that I served the annexed writ of habeas corpus on the therein-named Com. of Immigration, port of San Francisco, Calif., by mailing a true and correct copy thereof to Edward White, Com. of Immigration at Angel Island, in said District, on the 20th day of July, A. D. 1922.

J. B. HOLOHAN,  
U. S. Marshal,  
By Fred S. Field,  
Sal. Deputy.

[Endorsed]: Filed Jul. 21, 1922. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [14]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,518.

In the Matter of QUAN YUEI LEN, on Habeas Corpus.

**Return to Writ of Habeas Corpus.**

Comes now Edward White, Commissioner of Immigration, at the port of San Francisco, by P. A. Robbins, Immigration Inspector, and in return to said petition for writ of habeas corpus, admits, denies and alleges as follows:

I.

Denies that Quan Yuei Len, referred to as the detained, is unlawfully imprisoned, detained, confined and restrained or is unlawfully imprisoned, or detained, or confined or restrained of his liberty by Edward White, Commissioner of Immigration for the port of San Francisco or by any other person or persons whatever at the United States Immigration Station at Angel Island, county of Marin, State and Northern District of California, or elsewhere or at all so imprisoned, or detained, or confined, or restrained, but in this connection alleges the fact respecting the imprisonment, detention, confinement and restraint of the said Quan Yuei Len to be that the said Quan Yuei Len is detained by the said Commissioner of Immigration at the Immigration Station at Angel Island, county of Marin, State and Northern District of California, for deportation to

China pursuant to and under the authority of an order of deportation regularly and lawfully made, given and entered by E. J. Henning, Assistant Secretary of Labor, denying the application of the said Quan Yuet Len to enter the United States as appears from Respondent's Exhibit "A," heretofore filed as an exhibit in this case, and which said record is hereby referred to and made a part of this return with the same full [15] force and effect as if set out in full herein.

## II.

Denies that the said imprisonment, detention, confinement and restraint or the said imprisonment, or detention, or confinement or restraint are or is illegal.

## III.

Denies that the said detained is subject to or entitled to, admission to the United States under the terms and provisions or terms or provisions of the Act of Congress commonly known or referred to as the "Chinese Exclusion Laws," and denies that said detained is the lawful minor son of Quan Sing, and in this connection alleges the fact to be that the said Commissioner of Immigration at the port of San Francisco found and determined that the said detained was not the son of the said Quan Sing, and further alleges that the question of relationship between the said detained and the said Quan Sing was not passed upon or determined by the said Secretary of Labor.

## IV.

Denies that Quan Sing, the said father of said



Quan Yuei Len is a lawfully domiciled merchant or is actively engaged in said mercantile occupation as a member of the firm of Quong Tsue Lung Company, No. 130 Southside Plaza, Los Angeles, California.

V.

Denies that said Quan Yuei Len was refused and denied or refused or denied a fair hearing in good faith by the Secretary of Labor of the United States.

VI.

Denies that said Commissioner of Immigration duly or at all found that the relationship of father and son or father or son existed between the said Quan Yuei Len and Quan Sing.

VII.

Denies that the said Commissioner of Immigration found that Quan Yuei Len was or is a minor son of Quan Sing. [16]

VIII.

Denies that said Commissioner of Immigration duly or at all found that Quan Sing was a merchant or a member of the firm of Quan Tsue Lung Company.

IX.

Denies that said Quan Sing is actively engaged as a merchant in the establishment of said Quong Tsue Lung Company, Los Angeles, California, and denies that said Quan Sing is a lawfully domiciled merchant.

X.

Denies that the rights, privileges, exemptions and immunities, or the rights, or privileges, or exemp-

tions, or immunities guaranteed to the detained Chinese by the treaty between the United States and China have been infringed upon, and denies that he has been denied the same term of equality or impartiality which is freely accorded to aliens of whatsoever nationality who are of the Caucasian race.

## XI.

Denies that the said Commission of Labor which acted in the case of the said detained has abused the official discretion committed to it, or that its refusal to admit the said detained into the United States was or is in excess of the authority committed to it by the said statutes or was in abuse thereof.

WHEREFORE respondent prays that the writ of habeas corpus heretofore issued herein be discharged and the said Quan Yuei Len be remanded to the custody of the respondent for deportation, and for such other and further relief as to this Court seems equitable and just.

JOHN T. WILLIAMS,

United States Attorney.

BEN. F. GEIS,

Asst. United States Attorney. [17]

United States of America,  
Northern District of California,  
City and County of San Francisco,—ss.

P. A. Robbins, being first duly sworn, deposes and says: That he is a Chinese and Immigrant Inspector connected with the Immigration Service for the port of San Francisco, and has been specially

directed to appear for and represent the respondent, Edward White, Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within return to the writ of habeas corpus and knows the contents thereof; that of affiant's knowledge the matters set forth in the return to the writ of habeas corpus are true, excepting those matters which are stated on information and belief, and that as to those matters he believes it to be true.

P. A. ROBBINS.

Subscribed and sworn to before me this 22 day of July, 1922.

[Seal]

T. L. BALDWIN,

Deputy Clerk, U. S. District Court, Northern District of California.

Due service and receipt of a copy of the within is hereby acknowledged this 22 day of July, 1922.

WALTER E. HETTMAN,

Attorney for Petitioner.

[Endorsed]: Filed Jul. 22, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [18]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,518.

In the Matter of QUAN YUEI LEN, on Habeas Corpus.

**(Order Dismissing Writ of Habeas Corpus.)**

WALTER E. HETTMAN, Esq., Attorney for Petitioner.

JOHN T. WILLIAMS, Esq., United States Attorney, and BEN F. GEIS, Esq., Assistant United States Attorney, Attorneys for Respondent.

**ON RETURN TO PETITION FOR A WRIT OF  
HABEAS CORPUS.**

This is one of those cases in which the Bureau having found the facts against the applicant, such finding is conclusive on the Court, as the finding is not without support. The writ of habeas corpus heretofore issued is dismissed and the petitioner remanded.

February 10, 1923.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Feb. 10, 1923. W. B. Mal-  
ling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[19]

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In the Southern Division of the United States Dis-  
trict Court for the Northern District of Cali-  
fornia.

No. 17,518.

In the Matter of QUAN YUEI LEN, 13—4 Ex. SS.  
“Nanking,” October 14, 1921, on Habeas Cor-  
pus.

**Substitution of Attorneys for Petitioner and Detained.**

I hereby consent to the substitution of Alfred L. Worley and Louis Goldberg and hereby substitute them, as attorneys for the petitioner and detained herein, in my place and stead.

Dated April 4th, 1923.

WALTER E. HETTMAN,

Attorney for Petitioner and Detained.

We hereby accept the foregoing substitution and hereby appear herein as attorneys for the petitioner and detained herein.

ALFRED L. WORLEY,

LOUIS GOLDBERG,

Attorneys for Petitioner and Detained.

Dated April 4, 1923.

Service of the within substitution of attorneys and receipt of a copy thereof is hereby admitted this 6th day of April, 1923.

JOHN T. WILLIAMS,

United States Attorney for the Northern District of California.

[Endorsed]: Filed Apr. 7, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[20]



In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 17,518.

In the Matter of QUAN YUEI LEN (13—4 Ex. SS. "Nanking," October 14, 1921), on Habeas Corpus.

**Notice of Appeal.**

To the Clerk of the above-entitled Court, and to the Hon. John T. Williams, United States Attorney for the Northern District of California:

You and each of you will please take notice that Quan Yuei Len, the detained and petitioner herein, does hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the order and judgment made and entered herein on the 10th day of February, 1923, dismissing the writ of habeas corpus issued herein and remanding the detained.

Dated, San Francisco, California, April 11th, 1923.

ALFRED L. WORLEY,  
LOUIS GOLDBERG,

Attorneys for Petitioner, Detained and Appellant  
Herein. [21]

In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 17,518.

In the Matter of QUAN YUEI LEN (13—4 Ex. SS. "Nanking," October 14, 1921), on Habeas Corpus.

**Petition for Appeal.**

Comes now Quan Yuei Len, the detained, petitioner and appellant herein, and says:

That on the 10th day of February, 1923, the above-entitled court made and entered its order and judgment herein, dismissing the Writ of Habeas Corpus issued herein and remanding the detained, in which said order and judgment certain errors are made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herein.

WHEREFORE this appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit for a correction of the errors so complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

It is further prayed that during the pendency of the said appeal that the said Quan Yuei Len may retain his liberty and remain at large under the

order heretofore made and the bond heretofore given herein, provided that he remain within the State of California, and render himself in execution of whatever judgment is finally entered herein. [22]

Dated, San Francisco, California, April 11th, 1923.

ALFRED L. WORLEY,  
LOUIS GOLDBERG,

Attorneys for Petitioner, Detained, and Appellant  
Herein. [23]

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In the District Court of the United States, in and  
for the Northern District of California, Southern  
Division.

No. 17,518.

In the Matter of QUAN YUEI LEN (13—4 Ex.  
SS. "Nanking," October 14, 1921), on Habeas  
Corpus.

### **Assignment of Errors.**

Comes now Quan Yuei Len, the detained, petitioner and appellant herein, by his attorneys, Alfred L. Worley and Louis Goldberg, in connection with his petition for an appeal herein, and assigns the following errors which he avers occurred upon the trial or hearing of the above-entitled court, and upon which he will rely upon appeal to the Circuit Court of Appeals for the Ninth Circuit, to wit:

First. That the Court erred in dismissing the writ of habeas corpus issued herein and in remanding the appellant.

Second. That the Court erred in not holding that the appellant, Quan Yuei Len, had not been given, but had been refused and denied, a fair hearing in good faith by the Commissioner of Immigration of the port of San Francisco and by the Secretary of Labor of the United States.

Third. That the Court erred in holding that the Secretary of Labor having found the facts against the appellant on his application before the Immigration Department to enter the United States, such finding is not without support in the evidence and is and was conclusive on the court.

Fourth. That the Court erred in not holding that the appellant, Quan Yuei Len, was entitled to enter the United States as a minor son of a Chinese merchant lawfully domiciled and resident therein. [24]

Fifth. That the Court erred in holding that the Secretary of Labor and the Commissioner of Immigration of the port of San Francisco had accorded the appellant, Quan Yuei Len, a fair hearing in the matter of his application to enter the United States as a minor son of a Chinese merchant lawfully domiciled and resident therein.

Sixth. That the Court erred in not holding that the Commissioner of Immigration and the Secretary of Labor had abused the discretion vested in them in the conduct and in the course of the hearing of the application of the appellant, Quan Yuei Len, to enter the United States as a minor son of a Chinese merchant lawfully domiciled and resident in the United States.

Seventh. That the Court erred in not discharging the appellant, Quan Yuei Len, from custody, and in not permitting him to enter the United States as a minor son of a Chinese merchant lawfully domiciled and resident therein.

WHEREFORE, the appellant prays that the judgment and order of the United States District Court, in and for the Northern District of California, Southern Division, Division No. 1, made and entered herein in the office of the clerk of said court on the 10th day of February, 1923, dismissing the writ of habeas corpus issued herein and remanding the detained, be reversed, and that this cause be remitted to the lower court with instructions to discharge the said Quan Yuei Len from custody, or grant him a new trial before the lower court.

And it is further prayed that the said Quan Yuei Len may remain on bond in the sum of One Thousand Dollars (\$1,000), previously given herein, during the future and further proceedings to be had herein.

Dated, San Francisco, California, April 11th, 1923.

ALFRED L. WORLEY,  
LOUIS GOLDBERG,  
Attorneys for Appellant.

Service of the within notice of appeal, petition for appeal and assignment of errors, and receipt



of copies thereof, are hereby admitted this 11th day of April, 1923.

JOHN T. WILLIAMS,  
United States Attorney for the Northern District  
of California. [25]

[Endorsed]: Filed Apr. 11, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [26]

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In the District Court of the United States in and  
for the Northern District of California, South-  
ern Division.

No. 17,518.

In the Matter of QUAN YUEI LEN (13-4 Ex. SS.  
“Nanking,” October 14, 1921), on Habeas  
Corpus.

**Order Allowing Petition for Appeal.**

On this 12 day of April, 1923, comes Quan Yuei Len, the detained, petitioner and appellant herein, by his attorneys, Alfred L. Worley and Louis Goldberg, and having previously filed herein, does present to this Court his petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment made and entered herein on the 10th day of February, 1923, dismissing the writ of habeas corpus issued herein and remanding the detained, intended to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the

judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

IN CONSIDERATION WHEREOF, this Honorable Court does hereby allow the appeal herein prayed for, and orders and directs that the execution of the order of deportation made by the Secretary of Labor, be stayed, pending a hearing of the said case in the United States Circuit Court of Appeals for the Ninth Circuit, and it is further ordered that the said Quan Yuei Len may remain on bond in the sum of One Thousand Dollars (\$1,000) previously given herein during the further and future proceedings to be had herein, provided that he remain within the state of California, and render himself in execution of whatever judgment [27] is finally entered herein.

Dated April 12, 1923.

FRANK H. RUDKIN,  
United States District Judge.

Service of the within order allowing petition for appeal, and receipt of a copy thereof, are hereby admitted this 12 day of April, 1923.

JOHN T. WILLIAMS,  
United States Attorney for the Northern District  
of California.

[Endorsed]: Filed Apr. 12, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[28]

In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 17,518.

In the Matter of QUAN YUEI LEN on Habeas Corpus.

**Stipulation and Order Respecting Withdrawal of Immigration Record.**

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the petitioner and appellant herein, and the attorney for the respondent and appellee herein, that the original immigration record filed as Exhibits herein and marked Respondent's Exhibits "A," "B" and "C" and referred to as Exhibit "A" in the return to the writ of habeas corpus herein, may be withdrawn from the files of the clerk of the above-entitled court and filed with the clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, there to be considered as part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record and so certified to by the clerk of this Court.

Dated at San Francisco, California, August 9th, 1923.

WORLEY & GOLDBERG,

Attorneys for Petitioner and Appellant.

GARTON D. KEYSTON,

Asst. U. S. Atty., United States Attorney for the Northern District of California, Attorney for Respondent and Appellee. [29]

ORDER.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said immigration record therein referred to, may be withdrawn from the office of the clerk of this Court and filed in the office of the clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by the clerk of this court.

BLEDSON,

United States District Judge.

Dated at San Francisco, California, August 9th, 1923.

Service of the within stipulation and order respecting withdrawal of immigration record and receipt of copy thereof is hereby admitted this 9th day of August, 1923.

JOHN T. WILLIAMS,

U. S. Attorney, Attorney for Appellee.

[Endorsed]: Filed Aug. 9, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.  
[30]

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**Certificate of Clerk U. S. District Court to Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 30 pages, numbered from 1 to 30, inclusive, contain a



full, true and correct transcript of certain records and proceedings, in the Matter of Quan Yuei Len, No. 17,518, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein), and the instructions of the attorney for the petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of eleven dollars and five cents (\$11.05) and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal issued herein. (Page 32.)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 20th day of September, A. D. 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,  
Deputy Clerk. [31]

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**(Citation on Appeal.)**

United States of America,—ss.

The President of the United States, to Edward White, Commissioner of Immigration for the Port of San Francisco, and John T. Williams, United States Attorney for the Northern District of California, His Attorney herein,  
GREETING:



You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Southern Division of the Northern District of California, First Division, wherein Quan Yuei Len is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable ————— United States Circuit Judge for the Ninth Circuit, this 9th day of August, A. D. 1923.

WM. W. MORROW,  
United States Circuit Judge.

Service of the within citation and receipt of a copy thereof is hereby admitted this 9th day of August, 1923.

JOHN T. WILLIAMS,  
U. S. Attorney, Attorney for Appellee.

This is to certify that a copy of the within citation on appeal was lodged with me as the Clerk of this court upon the 9th day of August, 1923.

W. B. MALING,  
Clerk U. S. Dist. Court in and for the Nor. Dist.  
of California, at San Francisco.

By C. M. Taylor,  
Deputy Clerk.

[Endorsed]: No. 17,518. United States District Court for the Southern Division of the Northern District of California, First Division. In re Quan Yuei Len, on Habeas Corpus, Appellant, vs. Edward White, Commissioner of Immigration for the Port of San Francisco, Appellee. Citation on Appeal. Filed Aug. 9, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [32]

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[Endorsed]: No. 4110. United States Circuit Court of Appeals for the Ninth Circuit. Quan Yuei Len, Appellant, vs. Edward White, as Commissioner of Immigration for the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed September 20, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

In the Southern Division of the United States  
District Court in and for the Northern Dis-  
trict of California, First Division.

No. 17,518.

QUAN YUEI LEN, on Habeas Corpus,  
Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigra-  
tion at the Port of San Francisco,  
Appellee.

**Order Extending Time Thirty Days to File Rec-  
ord and Docket Cause—Dated August 9, 1923.**

Good cause appearing therefor, and upon motion  
of Alfred L. Worley, Esq., and Louis Goldberg,  
Esq., the attorneys for appellant herein:

IT IS HEREBY ORDERED that the time  
within which to docket the appeal herein in the of-  
fice of the Clerk of the United States Circuit Court  
for the Ninth Circuit may be, and the same is  
hereby extended for thirty days from and after  
the date hereof.

Dated at San Francisco, California, August 9th,  
1923.

WM. W. MORROW,  
Judge of the United States Circuit Court of Ap-  
peals, Ninth Circuit.

Service of the within order extending time to file  
record and docket cause and receipt of a copy

thereof is hereby admitted this 9th day of August, 1923.

JOHN T. WILLIAMS,  
U. S. Attorney, Attorney for Appellee.

No. 17,518. In the Southern Division of the United States District Court in and for the Northern District of California, First Division. In the Matter of Quan Yuei Len, on Habeas Corpus. Order Extending Time to File Record and Docket Cause. Filed Aug. 9, 1923. F. D. Monckton, Clerk.

[Endorsed]: No. 4110. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including September 9, 1923, to File Record and Docket Cause. Refiled Sep. 20, 1923. F. D. Monckton, Clerk.

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In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,518.

QUAN YUEI LEN, on Habeas Corpus,  
Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration of the Port of San Francisco,  
Appellee.

**Order Extending Time Thirty Days to File Record and Docket Cause—Dated September 6, 1923.**

Good cause appearing therefor, and upon motion of Alfred L. Worley, Esq., and Louis Goldberg, Esq., the attorneys for appellant herein:

IT IS HEREBY ORDERED that the time within which to docket the appeal herein in the office of the clerk of the United States Circuit Court for the Ninth Circuit may be, and the same is hereby extended for thirty days from and after the date hereof.

Dated at San Francisco, California, September 6, 1923.

HUNT,

Judge of the United States Circuit Court of Appeals, Ninth Circuit.

Service of the within order extending time to file record and docket cause, and receipt of a copy thereof is hereby admitted this 6th day of September, 1923.

JOHN T. WILLIAMS,

United States District Attorney for the Northern District of California.

No. 17,518. In the Southern Division of the United States District Court in and for the Northern District of California, First Division. Quan Yuei Len, on Habeas Corpus, Appellant, vs. Edward White, as Commissioner of Immigration at the Port of San Francisco, Appellee. Order Ex-



tending Time to File Record and Docket Cause. Filed Sep. 6, 1923. F. D. Monckton, Clerk.

[Endorsed]: No. 4110. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including October 6, 1923, to File Record and Docket Cause. Refiled Sep. 20, 1923. F. D. Monckton, Clerk.

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

QUAN YUEI QUONG,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration  
for the Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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QUAN YUEI QUONG,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration  
for the Port of San Francisco,  
Appellee.

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Transcript of Record.

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Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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### **Names of Attorneys of Record.**

For Petitioner and Appellant:

ALFRED L. WORLEY, Esq., and

LOUIS GOLDBERG, Esq.,

San Francisco, Cal.

For Respondent and Appellee:

UNITED STATES ATTORNEY,

San Francisco, Cal.

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In the Southern Division of the United States  
District Court in and for the Northern District  
of California, First Division.

No. 17,517.

In the Matter of QUAN YUEI QUONG, on Ha-  
beas Corpus.

### **Praeceptum for Transcript on Appeal.**

To the Clerk of Said Court:

Sir: Please make transcript of appeal in the  
above-entitled case, to be composed of the follow-  
ing papers, to wit:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Demurrer to petition for writ of habeas cor-  
pus.
4. Minute order of July 15th, 1922.
5. Opinion and order overruling demurrer to  
petition and directing writ to issue.
6. Writ of habeas corpus.

7. Order and judgment dismissing writ of habeas corpus, and remanding petitioner.
8. Substitution of attorneys for petitioner.
9. Notice of appeal.
10. Petition for appeal.
11. Assignment of errors.
12. Order allowing appeal.
13. Citation on appeal.
14. Stipulation and order respecting immigration record.
15. Clerk's certificate.

WORLEY & GOLDBERG,  
Attorneys for Petitioner.

Service of the within praecipe for transcript on Appeal and receipt of a copy thereof is hereby admitted this 9th day of August, 1923.

JOHN T. WILLIAMS,  
U. S. Attorney, Attorney for Appellee.

[Endorsed]: Filed Aug. 9, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.  
[1\*]

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In the Southern Division of the United States  
District Court for the Northern District of  
California.

No. (17,517).

In the Matter of QUAN YUEI QUONG, 13-13  
Ex. SS. "Nanking," October 14, 1921, on  
Habeas Corpus.

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\*Page-number appearing at foot of page of original certified Transcript of Record.

**Petition for Writ of Habeas Corpus.**

To the Honorable United States District Judge  
now Presiding in the Above-entitled Court:

It is respectfully shown by the petition of H. Embrett Lee that Quan Yuei Quong, who is hereinafter in this petition referred to as the "detained," is unlawfully imprisoned, detained, confined and restrained of his liberty by Edward White, Commissioner of Immigration, for the port of San Francisco, at the United States Immigration Station at Angel Island, county of Marin, within the Southern Division of the United States District Court in and for the Northern District of California, and the said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit:

That the said detained is a Chinese person subject to and entitled to admission into the United States under the terms and provisions of the acts of Congress of May 6, 1882, July 5, 1884, November 3, 1893, and April 29, 1902, as amended and added to by Section V of the Deficiency Act of April 7, 1904, which said acts are commonly known and referred to as the Chinese Exclusions Laws; that said detained is the lawful minor son of Quan Sing;

That said father of Quan Yuei Quong is a lawfully domiciled merchant, and is actively engaged in said mercantile occupation as a member of the firm of Quong Tsue [2] Lung Company, 130 Southside Plaza, Los Angeles, California;



That said detained, as the lawful minor son of said Quan Sing, made application to enter the United States, being incoming passenger No. 13-13 Ex. SS. "Nan King," which arrived at the port of San Francisco, October 14th, 1921; that, notwithstanding the admitted fact of paternity as above set forth, said Commissioner of Immigration and the Department of Labor did not admit said detained to land into the United States; that the illegality of such imprisonment, restraint, detention and confinement consists of this, to wit:

That, subsequent to his application to be admitted into the United States, the said Quan Yuei Quong was refused and denied a fair hearing in good faith by the Secretary of Labor of the United States, by a manifest misuse of discretion committed to him by law, and through errors and mistakes of law, and against the spirit and letter of the law, and denied his right to enter the United States; and in this respect, your petitioner alleges:

(1) That the said Quan Yuei Quong made application to the Commissioner of Immigration at the port of San Francisco for admission to the United States as the lawful minor son of said domiciled merchant, Quang Sing, the father of said applicant, and said Commissioner of Immigration duly found that said relationship of father and son existed;

(2) That said Commissioner of Immigration also found that said applicant, Quan Yuei Quong, was a minor son of Quan Sing;

(3) That said Commissioner of Immigration duly found that Quan Sing was a merchant and a member of the firm of Quong Tsue Lung Company, located at 130 Southside Plaza, Los Angeles, California, but said Commissioner of Immigration determined, as the sole basis for deciding against the admission of the applicant, that there was a large number [3] of partners for the small amount of business transacted by said Quong Tsue Lung Company, and, therefore, determined that said applicant should not be admitted into the United States;

(4) That, thereafter, an appeal from said Commissioner denying said application was taken by and on behalf of said Quan Yuet Quong to said Secretary of Labor, and thereafter said Secretary of Labor affirmed said Commissioner's decision, denying said application for admittance to the United States;

(5) That said Quan Sing is actively engaged as a merchant in the establishment of said Quong Tsue Lung Company, 130 Southside Plaza, Los Angeles, California, and owns a large proportionate interest in said partnership; that he has been for many years last past engaged in said work and in said store, and has not been engaged in any other business or any other pursuit whatsoever; that said Quan Sing is a lawfully domiciled merchant, under and by virtue of the terms of Section 2, of the Act of November 3d, 1893, of the laws governing the admission of Chinese into the United States;

(6) That, heretofore, several members of said firm of Quong Tsue Lung Company, 130 South-side Plaza, Los Angeles, California, of which Quan Sing is a partner, have been allowed and permitted by the Department of Labor to bring in their minor sons and daughters and by virtue of the status of fathers and as domiciled merchants, said father being engaged only in said business of the Quong Tsue Lung Company; that the said father, Quan Sing, was surprised by said decision of the Department of Labor because he was lulled into the belief, by a former decision of the Department in permitting the children of his partners to be landed; that the status of said partners of the firm of Quong Tsue Lung Company has been thoroughly established in the Immigration Records;

(7) That said Quan Sing has discovered [4] evidence which he was unable to present at the hearing of said matter before the Bureau of Immigration, at Angel Island, California, and said Quan Sing believes that, if said evidence had been presented at the original hearing, said applicant would have been duly admitted and landed as the minor son of said Quang Sing;

That said Quan Sing has employed A P. Entenza, Attorney at Law, with offices in the Merchants Exchange Building, in the city and county of San Francisco, State of California, to present said newly discovered evidence to the Secretary of Labor at Washington, D. C., and that the said attorney is en route to Washington, D. C., where

he expects to present said newly discovered evidence in person, before said Department of Labor; that said attorney is entirely familiar with all the facts in the matter contained in the immigration records of applicant, and said attorney has stated that he verily believes that said newly discovered evidence is of great merit and that when presented and urged before said Secretary of Labor, said Secretary will reopen the case to accept said newly discovered evidence and correct the error committed, and that said matter, when so presented will bring about said reopening and said rehearing of the applicant's case.

Your petitioner therefore alleges upon his information and belief that the rights, privileges, exemptions and immunities guaranteed to the detained Chinese aliens, by the treaty between the United States and China, have been infringed upon and he has been denied the same treatment of equality and impartiality which is freely accorded to aliens of whatsoever nationality who are of the Caucasian race.

Your petitioner, therefore, alleges upon his information and belief that the said Commissioner of Labor, which acted in the case of the said detained, has abused the official discretion committed to it, and that its refusal to admit [5] the said detained into the United States was in excess of the authority committed to it by the said statutes, and was in abuse thereof.

Your petitioner has not in his possession, nor under his control, a copy of the hearings or pro-



ceedings hereinbefore mentioned. Your petitioner alleges, however, that he has set forth herein the basic facts upon which the prayer for relief is made, but however, should the respondent desire to produce the immigration records appertaining to the case of the said detained, your petitioner stipulates, that upon their production, the said records may be considered with the same force and effect as if filed with this petition and as exhibits in support and in explanation thereof.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner of Immigration, commanding him to produce the body of the said detained, together with the time and cause of his detention, before your Honor at the time and place to be therein specified, to the end that the cause of the detention of the said detained may be inquired into, and that he be relieved of restraint and that he may be discharged from custody and go hence without day.

Dated: April 21st, 1922.

WALTER E. HETTMAN,  
Attorney for Petitioner. [6]

State of California,  
City and County of San Francisco,—ss.

H. Embert Lee, being first duly sworn, deposes and says:

That he is the petitioner; that he is a friend of said father, Quan Sing, named in the foregoing petition; that he is familiar with the facts therein contained; that he files this petition for and on be-



half of said father, because said father is now in the city of Los Angeles, State of California; that he has read the same and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters he believes it to be true.

H. EMBERT LEE.

Subscribed and sworn to before me this 21st day of April, 1922.

[Seal]

O. A. EGGERS,

Notary Public, in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Apr. 21, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[7]

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In the Southern Division of the United States  
District Court for the Northern District of  
California.

No. (17,517).

In the Matter of QUAN YUEI QUONG, 13-13  
Ex. SS. "Nanking," October 14, 1921, on Habeas Corpus.

**Order to Show Cause.**

Upon reading and filing the verified petition of H. Embert Lee, praying for the issuance of the writ of habeas corpus,

IT IS HEREBY ORDERED that Edward White, as Commissioner of Immigration at the

port of San Francisco, at Angel Island, be and appear before the above-entitled court, Department No. One thereof, on Saturday, the 29th day of April, 1922, to show cause, if any he have, why a writ of habeas corpus should not issue in this matter and the petition be granted as prayed, and this at the hour of 10 o'clock of said day; and

IT IS FURTHER ORDERED that said Quan Yuei Quong be not removed from the jurisdiction of this Court until the further order of this Court; and

IT IS FURTHER ORDERED that a copy of this order be served upon said Edward White, or such other person having the said Quan Yuei Quong in custody as an officer of said Edward White.

Dated: April 21st, 1922.

WM. C. VAN FLEET,  
United States District Judge.

[Endorsed]: Filed Apr. 21, 1922. W. B. Mal-  
ing, Clerk. By C. W. Calbreath, Deputy Clerk.  
[8]

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In the Southern Division of the United States  
District Court for the Northern District of  
California, First Division.

No. 17,517.

In the Matter of QUAN YUEI QUONG, on Ha-  
beas Corpus.

**Demurrer to Petition for Writ of Habeas Corpus.**

Comes now the respondent, Edward White, Com-

missioner of Immigration, at the port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

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United States Attorney.

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Asst. United States Attorney.

[Endorsed]: Filed Jul. 15, 1922. W. B. Mal-  
ing, Clerk. By Lyle S. Morris, Deputy Clerk.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 15th day of July, in the year of our Lord, one thousand nine hundred and twenty-two. Present: The Honorable MAURICE T. DOOLING, District Judge.

No 17,517.

In the Matter of QUAN YUEI QUONG, on Habeas Corpus.

**(Minutes of Court—July 15, 1922—Hearing on Demurrer.)**

This matter came on regularly this day for hearing on order to show cause as to the issuance of a writ of habeas corpus herein. W. E. Hettman, Esq., was present as attorney for petitioner and detained. P. A. Robbins, Esq., was present as attorney for and on behalf of respondent, and filed a demurrer to petition herein. After hearing attorneys for respective parties, the Court ordered matter submitted to abide the decision to be rendered in the matter of Quan Yuei Len, on habeas corpus, No. 17,518. [10]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 19th day of July, in the year of our Lord, one thousand nine hundred and twenty-two. Present: the Honorable MAURICE T. DOOLING, District Judge.

No. 17,517.

In the Matter of QUAN YUEI QUONG, on Habeas Corpus.

**(Minutes of Court—July 19, 1922—Order Overruling Demurrer and Granting Writ.)**

Pursuant to opinion this day filed, it is ordered that the Demurrer to petition for writ of habeas corpus be and the same is hereby overruled, and that the writ of habeas corpus issue, as prayed for, returnable July 29, 1922, at 10 A. M. [11]

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In the Southern Division of the United States District Court for the Northern District of California, First Division

No. 17,517.

In the Matter of QUAN YUEI QUONG, on Habeas Corpus.



(Opinion and Order Overruling Demurrer and  
Granting Writ.)

WALTER E. HETTMAN, Esq., and SCRIVNER &  
HETTMAN, Attorneys for Petitioner.

JOHN T. WILLIAMS, Esq., United States Attor-  
ney and BEN F. GEIS, Esq., Assistant United  
States Attorney, Attorneys for Respondent.

ON DEMURRER TO PETITION FOR A WRIT  
OF HABEAS CORPUS.

The only thing decided by the Department upon the appeal herein, and the reason given for the exclusion, was the fact that the firm of which petitioner's father claimed to be a member had too many members for the amount of business transacted. But the law does not seem to make that the test. *Lee Kan vs. U. S.*, 62 Fed. 914.

The demurrer is overruled and the writ will issue as prayed for returnable on July 29th, 1922, at 10 o'clock A. M.

July 19th, 1922.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Jul. 19, 1922. Walter B.  
Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[12]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,517.

In the Matter of QUAN YUEI QUONG, on Habeas Corpus.

**Writ of Habeas Corpus.**

The President of the United States of America to the Commissioner of Immigration, Port of San Francisco, Calif., Angel Island, California. GREETING:

YOU ARE HEREBY COMMANDED that you have the body of the said person by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged, before the Honorable Maurice T. Dooling, Judge of the United States District Court for the Northern District of California, at the courtroom of said Court, in the city and county of San Francisco, California, on the 29th day of July, A. D. 1922, at 10 o'clock A. M., to do and receive what shall then and there be considered in the premises.

And have you then and there this writ.

WITNESS, the Honorable MAURICE T. DOOLING, Judge of the said United States District Court, and the seal thereof, at San Francisco,

California, in said District, on the 19th day of July, A. D. 1922.

[Seal]

WALTER B. MALING,  
Clerk.

By C. W. Calbreath,  
Deputy Clerk.

WALTER E. HETTMAN, Esq.,  
Attorney for Petitioner. [13]

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**Return of Service of Writ.**

United States of America,  
Northern District of Calif.,—ss.

I hereby certify and return that I served the annexed writ of habeas corpus on the therein-named Com. of Immigration, port of San Francisco, Calif., by mailing true and correct copy thereof to Edward White, Com. of Immigration at Angel Island, in said District on the 20th day of July, A. D. 1922.

J. B. HOLOHAN,  
U. S. Marshal.  
By Fred S. Field,  
Sal. Deputy.

[Endorsed]: Filed Jul. 21, 1922. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[14]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,517.

In the Matter of QUAN YUEI QUONG, on Habeas Corpus.

**Return to Writ of Habeas Corpus.**

Comes now Edward White, Commissioner of Immigration at the port of San Francisco, by P. A. Robbins, Immigrant Inspector, and in return to said petition for writ of habeas corpus, admits, denies and alleges as follows:

I.

Denies that Quan Yuei Quong, referred to as the detained, is unlawfully imprisoned, detained, confined and restrained or is unlawfully imprisoned, or detained, or confined or restrained of his liberty by Edward White, Commissioner of Immigration for the port of San Francisco or by any other person or persons whatever at the United States Immigration Station at Angel Island, County of Marin, State and Northern District of California, or elsewhere or at all so imprisoned, or detained, or confined, or restrained, but in this connection alleges the fact respecting the imprisonment, detention, confinement and restraint of the said Quan Yuei Quong to be that the said Quan Yuei Quong is detained by the said Commissioner of Immigration at the Immigration Station at Angel Island, County of Marin, State and Northern Dis-

trict of California, for deportation to China pursuant to and under the authority of an order of deportation regularly and lawfully made, given and entered by E. J. Henning, Assistant Secretary of Labor, denying the application of the said Quan Yuei Quong to enter the United States as appears from Respondent's Exhibit "A," heretofore filed as an exhibit in this case, and which said record is hereby [15] referred to and made a part of this return with the same full force and effect as if set out in full herein.

## II.

Denies that the said imprisonment, detention, confinement, and restraint or the said imprisonment or detention or confinement or restraint are or is illegal.

## III.

Denies that the said detained is subject to or entitled to admission to the United States under the terms and provisions or terms or provisions of the Act of Congress commonly known or referred to as the "Chinese Exclusion Laws," and denies that said detained is the lawful minor son of Quan Sing, and in this connection alleges the fact to be that the said Commissioner of Immigration at the port of San Francisco, found and determined that the said detained was not the son of the said Quan Sing, and further alleges that the question of relationship between the said detained and the said Quan Sing was not passed upon or determined by the said Secretary of Labor.



## IV.

Denies that Quan Sing, the said father of said Quan Yuei Quong is a lawfully domiciled merchant or is actively engaged in said mercantile occupation as a member of the firm of Quong Tsue Lung Company, No. 130 Southside Plaza, Los Angeles, California.

## V.

Denies that said Quan Yuei Quong was refused and denied or refused or denied a fair hearing in good faith by the Secretary of Labor of the United States.

## VI.

Denies that said Commissioner of Immigration duly or at all found that the relationship of father and son or father or son existed between the said Quan Yuei Quong and Quan Sing.

## VII.

Denies that the said Commissioner of Immigration found [16] that Quan Yuei Quong was or is the minor son of Quan Sing.

## VIII.

Denies that said Commissioner of Immigration duly or at all found that Quan Sing was a merchant or a member of the firm of Quong Tsue Lung Company.

## IX.

Denies that said Quan Sing is actively engaged as a merchant in the establishment of said Quong Tsue Lung Company, Los Angeles, California, and denies that said Quan Sing is a lawfully domiciled merchant.

## X.

Denies that the rights, privileges, exemptions and immunities, or the rights, or privileges, or exemptions, or immunities guaranteed to the detained Chinese by the treaty between the United States and China have been infringed upon, and denies that he has been denied the same term of equality or impartiality which is freely accorded to aliens of whatsoever nationality who are of the Caucasian race.

## XI.

Denies that the said Commission of Labor which acted in the case of the said detained has abused the official discretion committed to it, or that its refusal to admit the said detained into the United States was or is in excess of the authority committed to it by the said statutes or was in abuse thereof.

WHEREFORE respondent prays that the writ of habeas corpus heretofore issued herein be discharged and the said Quan Yuei Quong be remanded to the custody of respondent for deportation, and for such other and further relief as to this Court seems equitable and just.

JOHN T. WILLIAMS,  
United States Attorney,  
BEN F. GEIS,

Asst. United States Attorney. [17]

United States of America,  
Northern District of California,  
City and County of San Francisco,—ss.

P. A. Robbins, being first duly sworn, deposes

and says: That he is a Chinese and Immigrant Inspector connected with the immigration service for the port of San Francisco, and has been specially directed to appear for and represent the respondent, Edward White, Commissioner of Immigration, in the within-entitled matter; that he is familiar with all the facts set forth in the within return to the writ of habeas corpus and knows the contents thereof; that of affiant's knowledge the matters set forth in the return to the writ of habeas corpus are true, excepting those matters which are stated on information and belief, and that as to those matters he believes it to be true.

P. A. ROBBINS.

Subscribed and sworn to before me this 22 day of July, 1922.

[Seal]

T. L. BALDWIN,  
Deputy Clerk, U. S. District Court, Northern District of California.

Due service and receipt of a copy of the within is hereby acknowledged this 22d day of July, 1922.

WALTER E. HETTMAN,

Atty. for Petitioner.

[Endorsed]: Filed Jul. 22, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [18]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,517.

In the Matter of QUAN YUEI QUONG, on Habeas Corpus.

**(Order Dismissing Writ of Habeas Corpus.)**

WALTER E. HETTMAN, Esq., Attorney for Petitioner.

JOHN T. WILLIAMS, Esq., United States Attorney and BEN. F. GEIS, Esq., Assistant United States Attorney, Attorneys for Respondent.

ON RETURN TO PETITION FOR A WRIT OF HABEAS CORPUS.

This is one of those cases in which the bureau having found the facts against the applicant, such finding is conclusive on the Court, as the finding is not without support. The writ of habeas corpus heretofore issued is dismissed and the petitioner remanded.

February 12th, 1923.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Feb. 12, 1923. W. B. Mal-  
ling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[19]

In the Southern Division of the United States  
District Court for the Northern District of  
California.

No. 17,517.

In the Matter of QUAN YUEI QUONG, 13-13  
Ex. SS. "Nanking," October 14, 1921, on  
Habeas Corpus.

**Substitution of Attorneys for Petitioner and De-  
tained.**

I hereby consent to the substitution of Alfred  
L. Worley and Louis Goldberg and hereby substi-  
tute them, as attorneys for the petitioner and de-  
tained herein, in my place and stead.

Dated, April 4th, 1923.

WALTER E. HETTMAN,  
Attorney for Petitioner and Detained.

We hereby accept the foregoing substitution  
and hereby appear herein as attorneys for the  
petitioner and detained herein.

Dated, April 4th, 1923.

ALFRED L. WORLEY,  
LOUIS GOLDBERG,  
Attorneys for Petitioner and Detained.

Service of the within substitution of attorneys  
and receipt of a copy thereof is hereby admitted  
this 6th day of April, 1923.

JOHN T. WILLIAMS,  
United States Attorney for the Northern District  
of California.



[Endorsed]: Filed Apr. 7, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[20]

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In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 17,517.

In the Matter of QUAN YUEI QUONG (13-13 Ex. SS. "Nanking," October 14, 1921), on Habeas Corpus.

**Notice of Appeal.**

To the Clerk of the above-entitled Court, and to the Hon. John T. Williams, United States Attorney for the Northern District of California:

You and each of you will please take notice that Quan Yuei Quong, the detained and petitioner herein, does hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the order and judgment made and entered herein on the 12th day of February, 1923, dismissing the writ of habeas corpus issued herein and remanding the detained.

Dated, San Francisco, California, April 11th, 1923.

ALFRED L. WORLEY,  
LOUIS GOLDBERG,

Attorneys for Petitioner, Detained and Appellant  
Herein. [21]

In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 17,517.

In the Matter of QUAN YUEI QUONG (13-13 Ex. SS. "Nanking," October 14, 1921), on Habeas Corpus.

**Petition for Appeal.**

Comes now Quan Yuei Quong, the detained, petitioner and appellant herein, and says:

That on the 12th day of February, 1923, the above-entitled Court made and entered its order and judgment herein, dismissing the writ of habeas corpus issued herein and remanding the detained, in which said order and judgment certain errors are made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herein.

WHEREFORE this appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit for a correction of the errors so complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

It is further prayed that during the pendency of the said appeal that the said Quan Yuei Quong

may retain his liberty and remain at large under the order heretofore made and the bond heretofore given herein, provided that he remain within the State of California, and render himself in execution of whatever judgment is finally entered herein.

Dated, San Francisco, California, April 11th, 1923.

ALFRED L. WORLEY,

LOUIS GOLDBERG,

Attorneys for Petitioner, Detained and Appellant  
Herein. [22]

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In the District Court of the United States, in and  
for the Northern District of California, Southern  
Division.

No. 17,517.

In the Matter of QUAN YUET QUONG (13-13  
Ex. SS. "Nanking," October 14, 1921), on  
Habeas Corpus.

### **Assignment of Errors.**

Comes now Quan Yuet Quong, the detained, petitioner and appellant herein, by his attorneys, Alfred L. Worley, and Louis Goldberg, in connection with his petition for an appeal herein, and assigns the following errors which he avers occurred upon the trial or hearing of the above-entitled cause, and upon which he will rely upon appeal to the Circuit Court of Appeals for the Ninth Circuit, to wit:

First. That the Court erred in dismissing the writ of habeas corpus issued herein and in remanding the appellant.

Second. That the Court erred in not holding that the appellant, Quan Yuei Quong, had not been given, but had been refused and denied, a fair hearing in good faith by the Commissioner of Immigration of the port of San Francisco and by the Secretary of Labor of the United States.

Third. That the Court erred in holding that the Secretary of Labor having found the facts against the appellant on his application before the Immigration Department to enter the United States, such finding is not without support in the evidence and is and was conclusive on the Court.

Fourth. That the Court erred in not holding that the appellant, Quan Yuei Quong, was entitled to enter the United States as a minor son of a Chinese merchant lawfully domiciled and resident therein.

Fifth. That the Court erred in holding that the Secretary of Labor and the Commissioner of Immigration of the [23] port of San Francisco had accorded the appellant, Quan Yuei Quong, a fair hearing in the matter of his application to enter the United States as a minor son of a Chinese merchant lawfully domiciled and resident therein.

Sixth. That the Court erred in not holding that the Commissioner of Immigration and the Secretary of Labor had abused the discretion vested in them in the conduct and in the course of the hearing of the application of the appellant, Quan Yuei Quong, to enter the United States as a minor son of a Chinese merchant lawfully domiciled and resident in the United States.



Seventh. That the Court erred in not discharging the appellant, Quan Yuei Quong, from custody, and in not permitting him to enter the United States as a minor son of a Chinese merchant lawfully domiciled and resident therein.

WHEREFORE, the appellant prays that the judgment and order of the United States District Court, in and for the Northern District of California, Southern Division, Division No. 1, made and entered herein in the office of the clerk of said court on the 12th day of February, 1923, dismissing the writ of habeas corpus issued herein and remanding the detained, be reversed, and that this cause be remitted to the lower court with instructions to discharge the said Quan Yuei Quong from custody, or grant him a new trial before the lower court.

And it is further prayed that the said Quan Yuei Quong may remain on bond in the sum of One Thousand Dollars (\$1,000.) previously given herein, during the future and further proceedings to be had herein.

Dated, San Francisco, California, April 11th, 1923.

ALFRED L. WORLEY,  
LOUIS GOLDBERG,

Attorneys for Appellant.

Service of the within notice of appeal, petition for appeal and assignment of errors, and receipt of copies thereof, are hereby admitted this 11th day of April, 1923.

JOHN T. WILLIAMS,  
United States Attorney for the Northern District  
of California.



[Endorsed]: Filed Apr. 11, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.  
[24]

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In the District Court of the United States, in and  
for the Northern District of California, Southern  
Division.

No. 17,517.

In the Matter of QUAN YUEI QUONG (13-13  
Ex. SS. "Nanking," October 14, 1921), on  
Habeas Corpus.

**Order Allowing Petition for Appeal.**

On this 12th day of April, 1923, comes Quan Yuei Quong, the detained, petitioner and appellant herein, by his attorneys, Alfred L. Worley and Louis Goldberg, and having previously filed herein, does present to this Court his petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment made and entered herein on the 12th day of February, 1923, dismissing the writ of habeas corpus issued herein and remanding the detained, intended to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

IN CONSIDERATION WHEREOF, this Honorable Court does hereby allow the appeal herein prayed for, and orders and directs that the execution of the order of deportation made by the Secretary of Labor, be stayed, pending a hearing of the said case in the United States Circuit Court of Appeals for the Ninth Circuit, and it is further ordered that the said Quan Yuei Quong may remain on bond in the sum of One Thousand Dollars (\$1,000) previously given herein during the further and future proceedings to be had herein, provided that he remain within the [25] State of California, and render himself in execution of whatever judgment is finally entered herein.

Dated, April 12, 1923.

FRANK H. RUDKIN,

United States District Judge.

Service of the within order allowing petition for appeal, and receipt of a copy thereof, are hereby admitted this 12 day of April, 1923.

JOHN T. WILLIAMS,

United States Attorney for the Northern District  
of California.

[Endorsed]: Filed Apr. 12, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[26]

In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 17,517.

In the Matter of QUAN YUEI QUONG on Habeas Corpus.

**Stipulation and Order Respecting Withdrawal of Immigration Record.**

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the petitioner and appellant herein, and the attorney for the respondent and appellee herein, that the original immigration record filed as Exhibits in that certain proceeding, in this Court, entitled "In the Matter of Quan Yuei Len, on Habeas Corpus," and numbered 17,518 in the records of the Clerk's office of this Court, and marked respondent's Exhibits "A," "B" and "C," and referred to as Exhibit "A" in the return to the writ of Habeas Corpus herein, may be withdrawn from the files of the clerk of the above-entitled court and filed with the Clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, there to be considered as part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record and so certified to by the Clerk of this Court.

Dated at San Francisco, California, August 9th, 1923.

WORLEY & GOLDBERG,

Attorneys for Petitioner and Appellant.

GARTON D. KEYSTON,

Asst. U. S. Atty., United States Attorney for the  
Northern District of California, Attorney for  
Respondent and Appellee. [27]

ORDER.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said immigration record therein referred to may be withdrawn from the office of the clerk of this Court and filed in the office of the clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified by the clerk of this Court.

BLEDSON,

United States District Judge.

Dated, San Francisco, California, August 9th, 1923.

Service of the within stipulation and order respecting withdrawal of immigration record and receipt of a copy thereof is hereby admitted this 9th day of August, 1923.

JOHN T. WILLIAMS,

U. S. Attorney, Attorney for Appellee.

[Endorsed]: Filed Aug. 9, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.  
[28]

**Certificate of Clerk U. S. District Court to Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 28 pages, numbered from 1 to 28, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the Matter of Quan Yuei Quong, No. 17517, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein), and the instructions of the attorney for the petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of nine dollars and sixty-five cents (\$9.65) and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal issued herein. (Page 30.)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 20th day of September, A. D., 1923.

[Seal]

WALTER B. MALING,

Clerk,

By C. M. Taylor,  
Deputy Clerk. [29]



**(Citation on Appeal.)**

United States of America,—ss.

The President of the United States, to Edward White, Commissioner of Immigration for the Port of San Francisco, and John T. Williams, United States Attorney for the Northern District of California, his attorney herein, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Southern Division of the Northern District of California, First Division, wherein Quan Yuei Quong is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable ———, United States Circuit Judge for the Ninth Circuit this 9th day of August, A. D. 1923.

WM. W. MORROW,  
United States Circuit Judge.

Service of the within citation and receipt of a copy thereof is hereby admitted this — day of August, 1923.

JOHN T. WILLIAMS,  
U. S. Attorney, Attorney for Appellee.  
C.

This is to certify that a copy of the within Citation on Appeal was lodged with me as the Clerk of this court upon the 9th day of August, 1923.

W. B. MALING,  
Clerk U. S. Dist. Court in and for the Nor. Dist. of  
California at San Francisco,

By C. M. Taylor,  
Deputy Clerk.

[Endorsed]: No. 17,517. United States District Court for the Southern Division of the Northern District of California, First Division. In re Quan Yuei Quong, on Habeas Corpus, Appellant, vs. Edward White, Commissioner of Immigration for the Port of San Francisco, Appellee. Citation on Appeal. Filed Aug. 9, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [30]

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[Endorsed]: No. 4111. United States Circuit Court of Appeals for the Ninth Circuit. Quan Yuei Quong, Appellant, vs. Edward White, as Commissioner of Immigration for the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United

States District Court for the Northern District of California, Second Division.

Filed September 20, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

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In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 17,517.

QUAN YUEI QUONG, on Habeas Corpus,  
Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration  
at the Port of San Francisco,

Appellee.

**Order Extending Time Thirty Days to File Record  
and Docket Cause—Dated August 9, 1923.**

Good cause appearing therefor, and upon motion of Alfred L. Worley, Esq., and Louis Goldberg, Esq., the attorneys for appellant herein:

IT IS HEREBY ORDERED that the time within which to docket the appeal herein in the office of the Clerk of the United States Circuit Court for the Ninth Circuit may be, and the same is hereby extended for thirty days from and after the date hereof.

Dated at San Francisco, California, August 9, 1923.

WM. W. MORROW,  
Judge of the United States Circuit Court of Appeals,  
Ninth Circuit.

Service of the within order extending time to file record and docket cause and receipt of a copy thereof is hereby admitted this 9th day of August, 1923.

JOHN T. WILLIAMS,  
U. S. Attorney, Attorney for Appellee.  
C.

No. 17517. In the Southern Division of the United States District Court in and for the Northern District of California, First Division. In the Matter of Quan Yuei Quong, on Habeas Corpus. Order Extending Time to File Record and Docket Cause. Filed Aug. 9, 1923. F. D. Monckton, Clerk.

[Endorsed]: No. 4111. United States Circuit Court of Appeals for the Ninth Circuit. Order under Subdivision 1 of Rule 16 Enlarging Time to and Including September 9, 1923, to File Record and Docket Cause. Refiled Sep. 20, 1923. F. D. Monckton, Clerk.

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17517.

QUAN YUEI QUONG, on Habeas Corpus,  
Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,  
Appellee.

**Order Extending Time Thirty Days to File Record and Docket Cause—Dated September 6, 1923.**

Good cause appearing therefor, and upon motion of Alfred L. Worley, Esq., and Louis Goldberg, Esq., the attorneys for appellant herein:

IT IS HEREBY ORDERED that the time within which to docket the appeal herein in the office of the Clerk of the United States Circuit Court for the Ninth Circuit may be, and the same is hereby extended for thirty days from and after the date hereof.

Dated at San Francisco, California, September 6, 1923.

W. H. HUNT,  
Judge of the United States Circuit Court of Appeals, Ninth Circuit.

Service of the within order extending time to file record and docket cause, and receipt of a copy



thereof is hereby admitted this 6th day of September, 1923.

JOHN T. WILLIAMS,  
United States District Attorney for the Northern  
District of California.

No. 17517. In the Southern Division of the United States District Court in and for the Northern District of California, First Division. Quan Yuei Quong, on Habeas Corpus, Appellant, vs. Edward White, as Commissioner of Immigration at the Port of San Francisco, Appellee. Order Extending Time to File Record and Docket Cause. Filed Sep. 6, 1923. F. D. Monckton, Clerk.

[Endorsed]: No. 4111. United States Circuit Court of Appeals for the Ninth Circuit. Order under Subdivision 1 of Rule 16 Enlarging Time to and Including October 6, 1923, to File Record and Docket Cause. Refiled Sep. 20, 1923. F. D. Monckton, Clerk.



No. 4111

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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QUAN YUEI QUONG,

*Appellant,*

VS.

EDWARD WHITE, as Commissioner of  
Immigration for the Port of San  
Francisco,

*Appellee.*

BRIEF FOR APPELLANT.

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ALFRED L. WORLEY,

LOUIS GOLDBERG,

*Attorneys for Appellant.*

FILED

FEB 18 1924



No. 4111

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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QUAN YUEI QUONG,

*Appellant,*

VS.

EDWARD WHITE, as Commissioner of  
Immigration for the Port of San  
Francisco,

*Appellee.*

## BRIEF FOR APPELLANT.

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### Statement of the Case.

This is an appeal by Quan Yuei Quong from an order of the Southern Division of the United States District Court for the Northern District of California dismissing a writ of habeas corpus issued by the said Court in behalf of the said Quan Yuei Quong, and remanding him to the custody of the appellee herein, Edward White, Commissioner of Immigration for the Port of San Francisco.

The record in the case shows that the appellant arrived at the Port of San Francisco from China on October 14, 1921, accompanied by Quan Yuei Len, his brother, (the appellant in case No. 4110,



now pending in this Court) and made application to the appellee herein, as Commissioner of Immigration of the said port, for admission into the United States as a minor son of Quan Sing, a Chinese merchant resident and engaged in business in Los Angeles, California; that evidence was submitted to the said Commissioner in support of the said application of the appellant for admission, both white and Chinese witnesses appearing and testifying before the Immigration officers acting under the said Commissioner, but that the appellant was denied admission by the said Commissioner; that an appeal was taken in behalf of said appellant to the Secretary of Labor, from the order and decision of the said Commissioner denying the appellant admission, and that the appeal so taken was dismissed by the Assistant Secretary of Labor and the appellant held for deportation to China; that while so held at the Immigration Station at Angel Island, California, awaiting deportation, a petition for a writ of habeas corpus, alleging among other matters unfairness of hearing, abuse of discretion and errors and mistakes of law on the part of the executive officers, was filed in behalf of the appellant in the United States District Court for the Northern District of California. A demurrer to the petition interposed by the United States Attorney, representing the appellee herein, was overruled, and a writ of habeas corpus issued. The appellee in due course made his return to the writ, making the entire immigration record of the hear-

ing accorded the appellant in the matter of his application for admission, which had been previously filed as an exhibit in the case, a part of the return "with the same full force and effect as if set out in full" therein. (Trans. page 18.) In the petition for the writ it was alleged as follows:

"Your petitioner has not in his possession, nor under his control, a copy of the hearings or proceedings hereinbefore mentioned. Your petitioner alleges, however, that he has set forth herein the basic facts upon which the prayer for relief is made, but however, should the respondent desire to produce the immigration records appertaining to the case of the said detained, your petitioner stipulates, that upon their production, the said records may be considered with the same force and effect as if filed with this petition and as exhibits in support and in explanation thereof." (Trans. pages 7 and 8.)

The Immigration Record is part of the record on appeal. (See stipulation and order respecting same. Trans. pages 31 and 32.)

It was alleged in the petition that the appellant's father, Quan Sing, had employed an attorney of San Francisco, A. P. Entenza, to present certain new evidence to the Secretary of Labor, and to seek a reopening of the appellant's case before the Secretary of Labor. It appears from the Immigration Record (page 104) that the attorney mentioned communicated by telegraph with E. J. Henning, the Assistant Secretary of Labor, respecting the case of the appellant, and received in reply from

the Assistant Secretary a telegram reading as follows:

“Answering telegrams Quan cases Department’s investigation of mercantile firm at Los Angeles sole basis for decision and facts presented cannot be overcome by testimony (stop) Determining factors are large number of partners for a very small business. Regret record does not justify reopening case.” (Immigration Record, page 105.)

*Particular attention is called to this telegram as showing what the Assistant Secretary himself upon whose order the appellant was held for deportation, regarded as the controlling and determinative reason for the dismissal of the appeal taken from the Commissioner’s adverse decision.*

It appears further from the record that while the habeas corpus proceedings were pending affidavits setting forth new evidence were presented to the Secretary, and an application for a reopening of the case was made, but that the said application was denied.

The so-called Board of Review of the Department of Labor, upon whose adverse recommendation the application for reopening was denied, specified its reasons for recommending the denial of the application in a memorandum opinion which we quote in full, as follows:

“In re Quon Shue Fun, Quan Yuei Len and Quon Yuei Quong.

These cases came before the Board of Review to consider request for reopening and to hear new evidence.

Roger O'Donnell attorney. No oral hearing.

This is the case of three Chinese aliens who applied for admission to the country as being the sons of two alleged merchants of the same firm. On March 22, 1922, this Board recommended, and the Department ordered, that the excluding decision be affirmed. The case having been reviewed at that time and the reasons for exclusion stated, there is no occasion for the review of that phase of the case.

There are now presented two affidavits, one: 'In re: Quon Quei Len and Quan Yuei Quong', minor sons of a merchant, and another, 'In re: Quon Shue Fun', minor son of a merchant. The substance of both affidavits which are signed by a number of persons, is that the undersigned are citizens of the United States and residents of Los Angeles, California, not Chinese; that each is well acquainted with the Chinese merchants named at the tops of the respective affidavits, alleged fathers of the minor sons (son) respectively; that the said firm of which they are members has engaged in the buying and selling of goods in Los Angeles; that the said Chinese are merchants of the community and have performed no manual labor for the past two years except such as is necessary and required in the conduct of the business; that each affiant is informed that the Chinese merchants in question have lawful sons (son) applying for admission as the sons (son) of merchants, and that the purpose of the affidavit is to benefit the said Chinese as bona fide merchants of the city and state named.

It will be noted that the affidavits contained no statement that the affiants are willing to appear before the officers of the Immigration



Service and testify as to their knowledge of the firm and its membership; that there is no statement in the affidavits as to the business of the affiants or their relations with the alleged Chinese merchants from which the Department could conclude the probability that the affiants are in a position to testify as to the mercantile status of the Chinese in question, and that there is no statement in the affidavits as to why these witnesses were not introduced by the alleged merchants at the prior investigation, and nothing to show that the testimony of these affidavits will be anything more than cumulative to the testimony already had in the case and upon which the Department has held that the fathers in these cases have no mercantile status.

It is noted, however, that the attorney states in his transmitting letter that two of the witnesses are police officers of Los Angeles and that one of the white witnesses describes the firm as one of the biggest firms in Chinatown.

The Board of Review is of the opinion that the affidavits lacking so many averments as pointed out above, and a request for reopening which attorney bases on certain facts stated in his letter but not incorporated in his affidavits are not sufficient grounds to justify a reopening and consequent delay in the cases, as a practice of reopening cases on such a showing would, of course, result in an interminable consideration of the cases. It is therefore recommended that the application for reopening be denied." (Immigration Record, pages 114 and 115.)

This recommendation was approved by the Assistant Secretary, E. J. Henning.

Counsel will not attempt to review in detail in this brief the evidence submitted to the Immigra-



tion authorities to establish the rights of the appellant to admission. The Immigration Record is before this Court. It is very voluminous, which fact, it appears to counsel, is due largely to the prolixity of Immigration Inspector J. C. Nardini, who conducted the investigation of the case and examined the witnesses at Los Angeles, the city in which the appellant's father's mercantile business is located, and where the witnesses resided. The unfair attitude of this Inspector toward this case, which had been entrusted to him for impartial hearing, can be judged from his report found on pages 67 to 73 of the Immigration Record, which report seems to have been adopted by the Examining Inspector Hans A. M. Jacobsen of the Angel Island Immigration Station, who examined the appellant and his brother, and by the officers of the Department of Labor at Washington. (See Report of Acting Commissioner-General of Immigration Wixon, pages 95 to 98, Immigration Record.)

Referring to the place of business of the appellant's father, Inspector Nardini uses the following language in his report:

"It seems that some air of mystery has pervaded this place ever since I have been in this city, and while applications of alleged members of the firm *have invariably been approved*, I am not satisfied that the partnership list is a bona fide one, nor do I believe from this investigation and the testimony, that Quan Sing is and has been a bona fide member of that firm for the statutory period." (Immigration Record, page 68.) (The italics are ours.)

As was said by appellant's counsel before the Department of Labor in his brief:

"The prejudicial and gruelling examination and cross-examinations to which the father and his witnesses were subjected is self-evident from the testimony itself." (Immigration Record, page 93.)

Without attempting a detailed review of the testimony submitted to the Immigration Department, counsel would submit that the Immigration Record clearly establishes the fact that the appellant and Quan Yuet Len (appellant in case Number 4110, now pending in this Court) are lawful minor sons of Quan Sing, and that Quan Sing is a lawful resident of the United States, having been such since 1881, and is a merchant engaged in business in Los Angeles, California, as an active partner in the mercantile firm of Quan Tsue Lung Company, which firm is engaged in dealing in general Chinese merchandise. The evidence submitted to the Immigration authorities shows that the firm has thirteen partners, all of them active in business, the manager being Quan Hay, and that the business transacted appears to aggregate about \$30,000 per annum, much of it being done on a credit basis and involving shipments of goods to Chinese in the country, on ranches and the like. It is further submitted that the Immigration Record shows that the firm has on hand a stock of merchandise worth from ten to thirteen thousand dollars; that it has over ten thousand dollars in accounts receivable; that no gam-

bling or other improper activities such as are regarded by the Immigration authorities as impairing the purely mercantile character of some Chinese firms, take place there; that Quan Sing does nothing but attend to the firm's business in the capacity of a partner therein, his specific duties as such being those of salesman and general helper. In this connection we would quote from the brief of appellant's counsel before the Department of Labor as follows:

"It is shown throughout the record that the duties of Quan Sing as a partner are those of a salesman inside and outside the store; he is not the bookkeeper or manager and has nothing to do with the bookkeeping or management of the business; yet the examining inspector carps and criticises because Quan Sing does not have knowledge of details of the firm's business which are peculiarly within the knowledge of the manager, or bookkeeper, or both. Such a test applied to any member of any Chinese firm, located anywhere would absolutely disqualify every member except the manager himself. That is precisely what Inspector Nardini is trying to do in this case, and he admits it on pages 3 and 4 of his summary and asserts that Quan Hay is, *in his opinion*, the sole proprietor of the place.

In reaching the last-named conclusion, Inspector Nardini advances nothing to show how or why Quan Sing would remain in this place for almost four years, pursuing no other occupation than that of merchandising. The existence of this situation is in itself sufficient to counteract the assertion that the status of Quan Sing is colorably acquired; the partnership records and the testimony of the father, the

manager, and the bookkeeper supply the necessary corroboration of the genuineness of the father's partnership activity." (Immigration Record, page 92.)

Inspector Nardini in his report comments on the size of the quarters occupied by the appellant's fathers' firm, as follows:

"The storeroom is about fifteen by thirty feet, and the only counter in the store is nine feet long, by actual measurement, two feet wide and two feet from the wall." (Immigration Record, page 69.)

The Inspector further states in his report:

"Outside of the office there is a stairway leading to the balcony and second floor, where seven or eight beds were seen, and there were several escapes leading to the roof. In the rear there is a kitchen, and to the right of the kitchen is a large room facing on another street, containing eight or ten beds. An avenue of escape from the store is also afforded in connection with this room. While it is expected that lottery and other gambling operations are carried on there it has never been possible to establish this, but the place is an ideal one for an escape and detection in case of emergency." (Immigration Record, page 68.)

The Immigration record shows that three witnesses other than Chinese testified as to Quan Sing's mercantile status and that they were subjected to a very severe examination to say the least, the character of their examination being commented upon by the appellant's counsel before the Department in his brief. (See Immigration Record, page 92.)



So much for the mercantile status of Quan Sing. The other issue in the case before the Immigration Department was the relationship between him and the appellant. This relationship was, we submit, amply established by the testimony adduced, but was not considered satisfactorily established by the Commissioner of Immigration. The appeal taken to the Secretary of Labor was dismissed at first apparently solely on the theory that the mercantile status of Quan Sing was not considered established, the issue of relationship not being therefore considered, but after the habeas corpus proceedings were instituted the case was referred to the Department again for a decision on the relationship feature, and the Board of Review, whose findings and recommendation were approved and confirmed by the Second Assistant Secretary, disposed of the relationship issue very summarily in the following language:

“The board of Review in view of the discrepancies, which are pointed out in the memorandum of February 27, 1922, is of the opinion that there is considerable doubt that applicants are the sons of the alleged fathers”. (Immigration Record, page 126.)

The language just quoted would seem to counsel to indicate an inclination to dispose of the relationship feature of the case as summarily as possible, and notwithstanding the final recommendation of the Board of Review (approved by Second Assistant Secretary Robt Carl White) that the excluding



decision be affirmed on the ground that the applicants have neither established that they are the sons of the alleged fathers or that the alleged fathers are merchants'', it is submitted by counsel that the Immigration Record would indicate that the controlling and determinative ground of the adverse action of the department is that referred to in Assistant Secretary Henning's telegram, previously quoted herein, the other matters referred to in the various reports and memoranda of the department officials being more or less incidental.

Before concluding this statement of the case, counsel would refer to the fact that none of the testimony adduced before the Immigration authorities was contradicted. No witnesses were submitted by the Immigration authorities to controvert or offset the case made out by the appellant, and the testimony of the witnesses produced by him stands absolutely uncontradicted.

Some time after the supplemental proceedings had in the Department of Labor were concluded the District Court made and entered its order dismissing the writ of habeas corpus which had been issued in the matter, the order being in the following language:

“This is one of those cases in which the bureau having found the facts against the applicant, such finding is conclusive on the Court, as the finding is not without support. The writ of habeas corpus heretofore issued is

dismissed and the petitioner remanded".  
(Trans. page 22.)

It is contended and submitted that the Immigration record of the hearing accorded the appellant shows on its face that the hearing accorded the appellant by the Immigration authorities was not a fair hearing, and that they acted arbitrarily and abused the discretion vested in them by law, to the detriment of the substantial rights of the appellant. The particulars and respects in which it is contended the unfairness and abuse of discretion consist will be pointed out later in this brief.

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### **Specification of Errors.**

The errors relied upon by the appellant are as follows:

First: That the Court erred in dismissing the writ of habeas corpus issued herein and in remanding the appellant.

Second: That the Court erred in not holding that the appellant, Quan Yuei Quong, had not been given, but had been refused and denied, a fair hearing in good faith by the Commissioner of Immigration of the port of San Francisco and by the Secretary of Labor of the United States.

Third: That the Court erred in holding that the Secretary of Labor having found the facts

against the appellant on his application before the Immigration Department to enter the United States, such finding is not without support in the evidence and is and was conclusive on the Court.

Fourth: That the Court erred in not holding that the appellant, Quan Yuet Quong, was entitled to enter the United States as a minor son of a Chinese merchant lawfully domiciled and resident therein.

Fifth: That the Court erred in holding that the Secretary of Labor and the Commissioner of Immigration of the port of San Francisco had accorded the appellant, Quan Yuet Quong, a fair hearing in the matter of his application to enter the United States as a minor son of a Chinese merchant lawfully domiciled and resident therein.

Sixth: That the Court erred in not holding that the Commissioner of Immigration and the Secretary of Labor had abused the discretion vested in them in the conduct and in the course of the hearing of the application of the appellant, Quan Yuet Quong, to enter the United States as a minor son of a Chinese merchant lawfully domiciled and resident in the United States.

Seventh: That the Court erred in not discharging the appellant, Quan Yuet Quong, from custody and in not permitting him to enter the United States as a minor son of a Chinese merchant lawfully domiciled and resident therein.

### Brief of the Argument.

The Courts have decided time and time again that where the hearing accorded an alien seeking admission into the United States is unfair, or where the action of the immigration officers is arbitrary or abuse of discretion vested in them is shown, or where the immigration officers base their action on an erroneous construction or interpretation of the law, their decision adverse to the alien is not final, but may be reviewed by the Courts. This principle seems to be so elementary in this class of cases that citation of authority upon it is really unnecessary.

*Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201;

*Kaneda v. United States*, 278 Fed. 694.

It is contended upon behalf of the appellant:

First: That the Assistant Secretary of Labor based his action upon an erroneous construction of the law in dismissing the appeal taken by the appellant to the Secretary of Labor upon the ground and for the reason that the appellant's father's firm had too many partners for the amount of business transacted.

Second: That the Assistant Secretary of Labor acted arbitrarily and abused the discretion vested in him in refusing, for the reasons given in the Board of Review's Memorandum, to reopen the case of the appellant and consider the additional evidence offered.



Third: That the hearing accorded the appellant was unfair in this: that Inspector Nardini, who conducted the hearing at Los Angeles, was biased and prejudiced against appellant's father's firm, and that this bias and prejudice were reflected in the entire conduct of the Los Angeles hearing, and in the report filed by this Inspector, and prevented the appellant from having a fair and impartial hearing.

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### **FIRST.**

#### **ERRONEOUS CONSTRUCTION OF THE LAW.**

It is contended that the Assistant Secretary of Labor based his action upon an erroneous construction of the law in dismissing the appeal taken by the appellant to the Secretary of Labor upon the ground and for the reason that the appellant's father's firm had too many partners for the amount of business transacted.

We quote the Assistant Secretary's language found in his telegram previously referred to:

"Answering telegrams Quan cases Department's investigation of mercantile firm at Los Angeles sole basis for decision and facts presented cannot be overcome by testimony (stop) Determining factors are large number of partners for a very small business. \* \* \*" (Immigration Record, page 105.)

Note the words:—"cannot be overcome by testimony."



The District Court held that the consideration mentioned was not a good reason as a matter of law for dismissing the appeal. In overruling the demurrer to the petition and in granting the writ, it said:

“The only thing decided by the Department upon the appeal herein, and the reason given for the exclusion, was the fact that the firm of which petitioner’s father claimed to be a member had too many members for the amount of business transacted. But the law does not seem to make that the test. *Lee Kan v. U. S.*, 62 Fed. 914.” (Trans. page 14.)

In this connection we would refer to the quotation in *Lee Kan v. U. S.*, 62 Fed. 914, taken from the debates in Congress at the time the so-called “Geary Act”, defining the term “Merchant” was under consideration, as follows:

“This amendment requires every Chinaman asking to be admitted into the United States, and who claims to have formerly resided here, to prove that for at least one year, at some fixed place of business within the Union, he was engaged in buying and selling merchandise. We do not demand that he shall have a dollar’s worth of stock, or a thousand dollars’ worth; we simply follow the language of the treaty, and demand this protection to our own people.”

It is submitted that the partners in a small Chinese mercantile concern are as much merchants and entitled to the classification and status as such as the partners in a large concern. The test under the statute is whether they are engaged in buying and selling merchandise at a fixed place of business,

and engage in no manual labor not necessary in the conduct of such business. 28 Stat, at L. 7 Chap. 14, U. S. Compl. Stat. 1901, p. 1322.

The considerations raised by Inspector Nardini, who conducted the hearing at Los Angeles, as to the size of the store room and the length of the counter (Immigration record, page 69) have nothing to do with the determination of mercantile status. Many large mercantile establishments have no counters at all and are conducted in small quarters.

Neither has the consideration that the appellant's father made more money as a cook than as a merchant anything to do with the determination of whether he is a merchant or not. (Immigration Record, page 97.)

It is submitted that the Immigration officers applied other tests than the test fixed by statute to determine whether the appellant's father is a merchant within the meaning of the law.

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## SECOND.

### ABUSE OF DISCRETION AND ARBITRARY ACTION.

It is contended that the Assistant Secretary of Labor acted arbitrarily and abused the discretion vested in him in refusing, for the reasons given in the Board of Review's memorandum, to re-open the case of the appellant and consider the additional evidence offered.

The reasons given are found on pages 114 and 115 of the Immigration Record, and are quoted in full in the "Statement of the Case" in this brief. The additional evidence offered relates to the question of the mercantile status of the appellant's father and is outlined in an affidavit signed by several persons other than Chinese, and its substance (along with the substance of a similar affidavit presented in a similar case) is stated by the Board of Review in the following language:

"The substance of both affidavits which are signed by a number of persons, is that the undersigned are citizens of the United States and residents of Los Angeles, California, not Chinese; that each is well acquainted with the Chinese merchants named at the tops of the respective affidavits, alleged fathers of the minor sons (son) respectively; that the said firm of which they are members has engaged in the buying and selling of goods in Los Angeles; that the said Chinese are merchants of the community and have performed no manual labor for the past two years except such as is necessary and required in the conduct of the business; that each affiant is informed that the Chinese merchants in question have lawful sons (son) applying for admission as the sons (son) of merchants, and that the purpose of the affidavit is to benefit the said Chinese as bona fide merchants of the city and state named." (Immigration Record, page 115.)

The reasons given for the refusal to grant the reopening and receive the evidence of the additional witnesses offered seem to counsel for the most part very trivial, to say the least.

One reason assigned is that the affidavit does not state that the affiants are willing to appear and testify. As the very object of the application was to have the case re-opened so that the additional witnesses could testify before the Immigration officers, this reason is certainly without merit and trivial.

Another reason assigned is that there is no statement in the affidavits as to the business of the affiants or as to their relations with the appellant's father, from which the department could conclude as to whether they were in a position to testify to his mercantile status. Such matters as these might properly, it is submitted, be covered in the oral examination or cross-examination by the Immigration officer which would follow the order of re-opening, and certainly are not necessary to be stated in the affidavit embodying the outline of the additional evidence offered, particularly where the affidavit states that the affiants are well acquainted with the appellant's father. It is submitted that this reason is also without merit and trivial.

Another reason assigned is that there is no statement in the affidavits as to why the witnesses were not introduced at the prior investigation and nothing to show that the testimony offered would not be cumulative to that already offered. When it is considered that the strict rules of legal procedure do not apply in immigration hearings, and the circumstance that it was considered that the testi-



mony of the witnesses theretofore introduced did not establish the applicant's father's mercantile status is borne in mind, it seems to counsel that this reason is also trivial. In the case of *Morrell v. Baker*, 270 Fed. 577, it was said:

“Hearings before administrative bodies, like the Immigration authorities, are not subject to the rules governing judicial proceedings.”

If in such proceedings the immigration authorities are not held to the strict rules of legal procedure, why should the alien seeking admission be? In a hearing before the Immigration officers where a Chinese person seeks admission, the hearing is held separate and apart from the public and without the presence of the alien's counsel, and the record in the case is not thrown open to the alien's counsel until the alien is denied admission by the port officials. Under such circumstances it would certainly seem unfair to hold the alien to the strict rules of judicial procedure in the submission of evidence. And after all, from the standpoint of common justice, would it not seem an abuse of discretion, where the witnesses submitted to prove mercantile status were held not credible or as not establishing the issue of mercantile status, to refuse to hear additional witnesses, who state in effect in their affidavit that they know the man in question to be a merchant, on the ground that such evidence would be cumulative?



It is submitted therefore that the reasons assigned for the refusal to hear the additional evidence offered constitute an abuse of discretion, and are in the nature of arbitrary action on the part of the administrative officer.

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### THIRD.

#### UNFAIR HEARING AND PREJUDICE.

It is contended that the hearing accorded the appellant was unfair in this: That Inspector Nardini, who conducted the hearing at Los Angeles was biased and prejudiced against appellant's father's firm, and that this bias and prejudice were reflected in the entire conduct of the Los Angeles hearing, and in the report filed by this Inspector, and prevented the appellant from having a fair and impartial hearing.

It must be borne in mind that in the cases of incoming aliens applying for admission, the hearings had are of an *ex parte* character, the alien's counsel not being permitted to be present at the hearing. Under these circumstances, the alien himself being unrepresented at the hearing, it is submitted that fairness and impartiality in the highest degree and a solicitude for the rights of the alien should characterize the proceedings. The alien being a foreigner, usually unacquainted with our language and amid surroundings likely to awe him, and the witnesses appearing for him being likewise usually

aliens, and standing more or less in awe of government officers, the utmost care should be taken to see that the testimony is fairly taken, and that fear and timidity do not interfere with getting the facts as they really exist in the record. A kindly attitude on the part of the government officers will do more to help in getting the real facts of the case clearly in the record than the most exhaustive examination and cross-examination, where the attitude of the officer conducting the same is hostile or severe. Too often the officer seems to regard himself as a prosecuting officer, and forgetting that he is to look out for the rights of the alien as well as those of the government, his official zeal runs away with his discretion and his fairness, and while perhaps not actually intimidating the witness appearing before him, his hostile attitude interferes with and prevents a correct disclosure of the facts. We cannot in this connection refrain from quoting the language of the learned judge in the case of *Lum Hoy Kee v. Johnson, Immigration Commissioner*, 281 Fed. 872:

“As I have before observed, in cases tried in such a summary manner and under conditions so difficult for the applicant for admission as cases of this sort, a heavy burden is put upon the immigration tribunals to protect the rights of the applicant as well as those of the government.”

It is submitted that the report of Inspector Nardini as a whole evidences an indefinable and in-

describable prejudice against the applicant's father and his firm, and a reading of the report is therefore requested. (Immigration Record, pages 67 to 73.)

Particular attention is called to the Inspector's minute description of the store of the firm in question and to the suspicion on the Inspector's part evidenced by his use of the following language therein:

“Outside of the office there is a stairway leading to the balcony and second floor, where seven or eight beds were seen, and there were several escapes leading to the roof. In the rear there is a kitchen, and to the right of the kitchen is a large room facing on another street, containing eight or ten beds. An avenue of escape from the store is also afforded in connection with this room. While it is expected that lottery and other gambling operations are carried on there it has never been possible to establish this, but the place is an ideal one for an escape and detection in case of emergency.”

Could an officer who “expects”, utterly without evidence, “*that lottery and other gambling operations*” are carried on in the premises occupied by the firm, be regarded as a fair officer to investigate the mercantile firm, or to take the evidence touching on the right of a son of a member thereof to admission into this country?

Attention is called to Inspector Nardini's language found on page 68 of the Immigration Record

as evincing a hostile attitude toward the appellant's father's firm:

“It seems that some air of mystery has pervaded this place ever since I have been in this city, and while applications of alleged members of the firm have invariably been approved, I am not satisfied that the partnership list is a bona fide one, \* \* \*.”

Was a man who had evidently been watching “this place” ever since he had been in Los Angeles, and who held the views that this Inspector evidently held regarding this firm, and regarding the correctness of the decisions of officers superior to him in the immigration service on applications of other partners in the firm for merchant's return certificates, a fair man to take the testimony in the appellant's case, and from a man holding such views could we not expect to find such a record as we find here?

Suspicion is not evidence, but evidently it has been accorded in the appellant's case before the Immigration Department the same weight as evidence.

The prolix and harassing method of examination pursued by the Los Angeles Inspector can only be judged by a perusal of the record of the testimony taken by him. Prolixity, it is submitted, in itself may not be necessarily evidence of unfairness, or may not necessarily constitute unfairness, but when carried to the extreme we find in this case, it does, we submit, annoy and harass witnesses, and when



it is attended with suspicion such as we find evidenced in the report of the inspector, and a general hostile attitude such as his report discloses, it does render the hearing unfair, as not coming up to that standard of absolute fairness which the law demands in a hearing of this character, where the counsel of the party in interest is not allowed to be present thereat or take part therein.

As an illustration of an harassing requirement made of the appellant's father during his examination we would quote the following extract from the record of the Los Angeles hearing:

“Q. Are you prepared to furnish a Chinese partnership list in quintuplicate, and its translation in octuplicate?”

A. Yes.” (Immigration Record, page 56.)

It is submitted that the immigration record shows that the Los Angeles hearing does not measure up to that standard of fairness which the law demands.

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In conclusion it is respectfully submitted that the judgment of the District Court herein be reversed and the appellant discharged.

Dated, San Francisco,

February 11, 1924.

Respectfully submitted,

ALFRED L. WORLEY,

LOUIS GOLDBERG,

*Attorneys for Appellant.*



IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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QUAN YUEI QUONG,

*Appellant,*

VS.

EDWARD WHITE,

as Commissioner of Immigration for  
the Port of San Francisco,

*Appellee:*

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## BRIEF FOR APPELLEE

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JOHN T. WILLIAMS,

*United States Attorney,*

ALMA M. MYERS,

*Asst. United States Attorney,*

*Attorneys for Appellee.*



No. 4111

IN THE

## United States Circuit Court of Appeals

For the Ninth Circuit

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QUAN YUEL QUONG,

*Appellant,*

vs.

EDWARD WHITE,

as Commissioner of Immigration for  
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*Appellee.*

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### BRIEF OF APPELLEE

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#### STATEMENT OF FACT.

Quan Yuei Quong, appellant herein, arrived at the port of San Francisco, California, on the steamship "Nanking" on October 14, 1921 (Ex. A, p. 86), and thereupon made application to enter the United States as the minor son of Quan Sing, alleged to be a domiciled Chinese merchant. He was accompanied by Quan Yuei Len, his alleged brother, who is the appellant in case No. 4110, now pending before this court.

In support of his application to land there was filed the affidavit of the alleged father, Quan Sing, bearing the photographs of the affiant, and Quan Yuie Quong (Ex. A, p. 85D); the affidavit of Quan Hay (Ex. A, p. 85B) and the joint affidavit of T. L. Dickinson and Wm. Moore (Ex. A, p. 85A).

The application of said Quan Yuet Quong was heard and on December 9, 1921, the Commissioner of Immigration at the port of San Francisco made a finding (Ex. A, p. 76) in which he states that he was unable to conclude that the applicant was entitled to enter the United States, as neither the claimed mercantile status of the alleged father nor the existence of the claimed relationship had been satisfactorily established. The finding was not final, but allowed ten days for the production of additional evidence. Thereafter, on December 13, 1921, the attorneys for the applicant (the present counsel for the appellant herein) advised the Commissioner of Immigration by letter that they had no additional evidence to submit and requested that a final decision be made in the case (Ex. A, p. 78), whereupon, under date of December 15, 1921, the Commissioner of Immigration denied the application to enter. The decision restated the grounds of denial—that neither the mercantile status nor relationship had been satisfactorily established. (Ex. A, p. 80.)

From this action an appeal was taken to the Secretary of Labor, Washington, D. C., and under date

of March 22, 1922, a decision was reached by E. J. Henning, Assistant Secretary of Labor, who held that the mercantile status of the alleged father, Quan Sing, had not been established, thus disposing of the appeal on this single issue. (Ex. A, pp. 99-100.)

Thereafter, on April 21, 1922, a petition for writ of habeas corpus (Tr. 3) and order to show cause (Tr. 9) were filed in the District Court.

On July 15, 1922, a demurrer to the said petition was filed (Tr. 10) together with respondent's exhibits, "A," "B" and "C," and the matter argued and submitted.

On July 19, 1922, the demurrer was overruled and writ was issued (Tr. 14).

Thereafter, July 22, 1922, return was made to the writ (Tr. 17), whereupon the Court, on motion of the United States Attorney, directed that the writ heretofore issued be made not final, but conditional, providing the Department passed upon the question of relationship within thirty days from July 22, 1922.

Within the thirty day period, to wit, on August 3, 1922, a finding was made by Robt Carl White, Second Assistant Secretary of Labor, holding that neither the relationship nor the mercantile status claims had been established. (Ex. A, p. 126.)

On September 23, 1922, the case was argued and submitted to the court and on February 12, 1923,



the court ordered the writ dismissed and the petitioner remanded (Tr. 22), from which order and judgment of the District Court this appeal is taken.

### ARGUMENT.

The petition alleges <sup>and</sup> ~~that~~ it is assigned as error that the immigration officials denied the detained the fair hearing and consideration to which he was entitled under the law.

When the applicants Quan Yuei Quong and Quan Yuei Len presented themselves at the port of entry they were required to establish, to the satisfaction of the immigration authorities, first that they were the minor sons of the Chinese claiming to be their father, and secondly, that the father was a Chinese of the exempt class, to wit, a merchant. Having made such proof, the applicants would have been entitled to enter the United States.

*United States v. Mrs. Gue Lim*, 176 U. S. 459.

As to the claim of relationship, it appears that the alleged father of the applicants, Quan Sing, also known by the names of Quan Eng Coon and Quan Chin Bui, first came to the United States in the year K. S. 7 (1881), at which time he was twenty-one years old. In December, 1902, he went to China and returned to this country in September, 1904, so that he was in China at the most twenty months. He claims that he was married in January, 1903; that his first son, Quan Yuei Len, was born in November, 1903, and that his second son, Quan Yuei

Quong, was born in January, 1905. Quan Sing has made no subsequent trip to China and it will be noted that he left China when one alleged child was less than one year old and that the second alleged child was born after his departure. The alleged father having left China twenty years ago, can furnish little information to the immigration officials which, when used as a basis for questioning the applicants disclosed a knowledge of circumstances which can be said to be persuasive as to the existence of the relationship. Questions as to kinship, the physical features of the village and similar matters were asked following the usual course in these cases.

There is one discrepancy between the statement of the alleged father and those of the applicants, which it is believed would not exist were the relationship as claimed. The alleged father testified that the applicants' maternal grandfather, one Jew Jin Haw, is living; that his son, Quan Yuei Len, wrote him last year to this effect. (Ex A, p. 65.) The two applicants are in agreement, however, that this person, Jew Jin Haw, died about twelve or thirteen years ago. (Ex A, pp. 12 and 16.)

Quan Hay, the manager of the firm in which it is claimed that the alleged father is a member, appeared as a witness for the applicants. He claims that on a recent visit to China he took \$200.00 given to him by Quan Sing to the latter's family in China and he claims to have seen the applicants at their

village when he called there. In this way, he states, he got to know of the relationship, but his testimony is weakened by discrepancies. He testifies that the applicants were at their house in the village when he arrived (Ex. A, p. 37), while the applicants state that they were at school at the time and that Quan Hay was at their house when they got there. (Ex. A, pp. 10 and 14.)

Quan Hay and the applicants came to the United States on the same steamer. He testifies that, when the applicants heard that he was about to return to the United States, the applicants met him in Chuck Hom market and went with him to Hongkong. (Ex. A, pp. 34 and 35.) The applicants state that they met Quan Hay in Hongkong and make no mention of having met him in Chuck Hom. (Ex. A, pp. 10 and 13.) Quan Hay, in the estimation of the immigration authorities, is discredited by the discrepancies mentioned.

The courts have repeatedly held that the determination of questions of fact is exclusively for the immigration authorities. In this case, in dismissing the writ of habeas corpus, His Honor, Judge Dooling, said:

“This is one of those cases in which the Bureau having found the facts against the applicant, such finding is conclusive on the Court, as the finding is not without support. The writ of habeas corpus is dismissed and the petitioner remanded.”

In the case of *Jeung Bock Hong v. White*, 258 Fed. 23, decided by this Honorable Court, it appears that the most important of the discrepancies in the record was the statement by one applicant that their house in China was three feet from the next house, while the other applicant stated that the houses touched.

The Court in that case said:

“The discrepancies in the testimony appear to be unimportant; but if, taking them altogether, the evidence in support of the petitioners’ right to land and enter the United States was so impaired as to render it unsatisfactory, the court is not authorized to reverse the conclusion.”

The reasoning in the case of *Soo Hoo Doo Hon v. Johnson*, 281 Fed. 870, applies with particular force to the present case. The Court said:

“Proof that fabricated testimony has been introduced does much more than merely discredit the witness involved; it put the whole case of the party on whose behalf it was offered under suspicion. In this instance the immigration tribunals were quite within their rights in rejecting the testimony of both the applicant and his alleged father. It does not seem to me that under the circumstances disclosed they acted arbitrarily and unfairly in refusing to accept the testimony of the other witnesses as establishing the applicant’s parentage as claimed by him.”



The principal involved is well settled by the decisions and extended discussion would seem to be unnecessary. Cases in point, however, are as follows: *Louie Share Gan v. White*, 258 Fed 798; *Lee Ah Yin v. United States*, 116 Fed. 614; *Chang Sim v. White*, 277 Fed. 765; *Chin Yow v. United States*, 208 U. S. 8.

As to the mercantile status claimed by Quan Sing, his claim essentially is as follows: That he is a member of the firm of Quan Tsue Lung Company, which firm is located at 22 Plaza Street, Los Angeles, California; that he became a member of said firm in February or March, 1918; that said firm is conducted as a partnership, there being seventeen partners in all; thirteen active and four silent members; that Quan Sing's interest in the firm amounts to \$500; that he is a salesman for said firm, which deals in Chinese groceries. Two Chinese witnesses appeared and testified for the alleged father, namely Chew Yuen and Quan Hay, who state that they are bookkeeper and manager respectively of the said firm. Three persons, other than Chinese, also testified, these being T. L. Dickinson, Herbert E. Schultz and Ray Olds.

Under Section 2 of the act of November 3, 1893, the term "merchant" is defined as follows:

"The term 'merchant' as employed herein and in acts to which this is amendatory shall have the following meaning and none other: A merchant is a person engaged in the buying



and selling of merchandise, at a fixed place of business, which business is conducted in his name and who during the time he claims to be engaged as a merchant does not engage in the performance of any manual labor except such as is necessary in the conduct of his business as such merchant \* \* \*”.

The Supreme Court, in the case of *Tom Hong v. United States*, 193 U. S. 517, commented on the act in part as follows:

“The purpose of the law is to prevent those who have no real interest in the business from making fraudulent claims to the benefits of the act as merchants. The interest in the business must be substantial and real and in the name of the person claiming to own it, but the partner’s name need not necessarily appear in the firm style when carried on, as is usual among Chinese, under a company name, which does not include the individual names. The main purpose is to require the person to be a bona fide merchant, having in his own name and right an interest in a real mercantile business.”

The Immigration authorities heard the witnesses and made an investigation into the bona fides of the alleged father’s claim to membership in the firm. Certain inconsistencies and discrepancies occurred during the investigation which resulted in the finding that the alleged father’s claim to mercantile status was not real but was a pretended one.

It appears that on December 5, 1902, the alleged father, Quan Sing, testified before the immigration

authorities at Los Angeles, in connection with an application filed by him to depart and return to this country as a Chinese laborer. (Ex. B, p. 6.)

The testimony then given by Quan Sing and his witnesses was directed toward showing that Quan Sing, as a registered Chinese laborer, was the owner of property or had debts due of not less than \$1,000, such showing being required under the statute in the cases of Chinese laborers.

The noteworthy portions of the testimony then given are as follows:

“Q. What is your name?

A. Quan Sing.

\* \* \* \*

Q. What have you been doing since you first came?

A. Been cooking and laundry work.

Q. What property have you accumulated?

A. I have property in Quan Tsue Lung and laundry on Buena Vista Street, besides a little money, and I don't want to count that.

Q. What is the business of Quan Tsue Lung?

A. Grocery and general merchandise.

Q. How much interest have you in the store of Quan Tsue Lung?

A. \$500.

Q. How long have you had \$500 invested in that store?

A. Ten years.

Q. Have you been employed about the store?

A. No.

Q. What have you been doing during the last year?

A. Cooking, and start laundry, too."

(Ex. B, pp. 5 and 6.)

At the same hearing Quan Chow, who represented himself as the manager of the Quan Tsue Lung & Co., testified in part as follows:

"Q. What is your name?

A. Quan Chow.

\* \* \* \*

Q. How many partners have you in the firm of Quan Tsue Lung?

A. Ten stockholders.

Q. How many partners?

A. That is ten partners.

Q. What are the names of your partners?

A. Quan Hay, Quan Chew, Quon Wing Quan, Quan Seung Wo, Quan Wo, Quan Sam, *Quan Sing*, Lung Ark, Quan Sing Fong, Quan Wing.

Q. How much interest has Quan Sing?

A. \$500.

Q. How long has Quan Chow owned an interest in the store?

A. Nearly thirteen years.

Q. How long has Quan Hay owned an interest in the store?

A. Longer than I have.

Q. How long has Quan Sing?

A. Ten years.

Q. Has Quan Sing owned an interest in the Quan Tsue Lung Co. continually for ten years?

A. Yes, sir.” (Ex. B, p. 4.)

In September, 1904, Quan Sing returned from his visit to China and he again testified as follows:

“Q. What is your name?

A. Quan Sing.

\* \* \* \*

Q. What statements did you make when you applied for your return certificate as to your family or debts or property qualifications?

A. I have debts owing me in this country.

\* \* \* \*

Q. Who owes you this money?

A. The firm of Quong Tui Lung & Co. of Los Angeles owes me \$500 and the Quong Yick Laundry of Los Angeles owes me \$500.

\* \* \* \*

Q. What person in the Quong Yick laundry owes you this money?

A. The laundry does not owe me any money; I meant to say that the laundry is owned by two of us, my partner is Quan Quock Kee; my share in the laundry is \$500.

Q. Did you and Quan Quock Kee open up that laundry together?

A. Yes.

Q. When?

A. It was opened up about a year and a half prior to my return to China.

\* \* \* \*

Q. What does Quan Tui Lung do?

A. They are in the general merchandise and tea business at 22 South Plaza, Los Angeles.

Q. When did you let that firm have the \$500?

A. In K. S. 16th or 17th (1890-1891).

Q. Where were you working when you let this firm have the \$500?

A. I was employed at the Santa Monica Hotel; I think I was employed there at the time, but I am not certain.

Q. Did you let them have this money all at one time?

A. All in one sum.

Q. That has been 12 or 13 years ago?

A. I didn't lend the \$500 to the firm at all; *I have an interest in that firm of \$500.*

Q. When did you purchase the \$500 interest in the firm?

A. In K. S. 16th year.

Q. What month?

A. I don't remember what month it was?

Q. To whom did you hand over that \$500.

A. Quan Hei was the manager at the time; I handed the money to him.



Q. Did you buy somebody's interest or did you join as an additional partner?

A. I didn't buy any person's share in the business.

\* \* \* \*

Q. Does your name appear on the partnership list of that firm on file in the Chinese Bureau?

A. *Yes, it is on the list.*

(Ex. B, pp. 15 and 16.)

In the present case Quan Sing testified as follows:

Q. How long have you lived in Los Angeles?

A. About 40 years.

Q. You were a laundryman here for a number of years, were you not?

A. Yes, in a company in Santa Monica.

Q. Haven't you been a laundryman here on Buena Vista Street, here in Los Angeles?

A. Not in this city.

Q. You have been a cook in this city, haven't you?

A. Yes.

Q. When you went to China in 1902 didn't you claim that you and another Chinaman conducted a laundry on Buena Vista Street in Los Angeles?

A. No.

Q. What was the name of that laundry? Wasn't it called the Quan Yick laundry?

A. I was not a member of the laundry, the laundry had my money, I went as a laborer.

Q. Didn't you say in the examination at that time that you and Quan Kee were the only men who conducted that laundry?

A. I do not remember now, it is more than 20 years ago.

Q. You do not remember about the transaction at all, then, do you?

A. No, I do not remember.

Q. If you had told the truth at that time you would remember, would you not?

A. No, I had my money there, I was not a partner in that business.

Q. Upon what ground did you base your right to visit China as a laborer at that time?

A. The Quan Yick laundry owed me money, \$500, and the Quan Suey Lung Co. owed me \$500.

Q. Which member of the firm owed you the money?

A. Quan Jew.

Q. What did he borrow the money from you for?

A. To get some goods with the money.

Q. Then you were not a member of that company when you went to China?

A. No, not a member of it.

Q. Well, why did you say that you became a member of that company then 10 years before you went to China on that occasion?

A. I did not say that.

\* \* \* \*

Q. What was the last place you worked at as a laborer, laundryman or cook, when and where was it?

A. The last laboring work I did was in a laundry, the Quan Yiek laundry located near the Mexican town this city.

Q. When did you quit working there?

A. About K. S. 28, when I went to China.

\* \* \* \*

Q. When did you come to the Quan Suey Lung Co.?

A. C. R. 7 (1918).

Q. Did you go to work with the company in C. R. 7?

A. I worked there and became a member there?

Q. When did you become a member?

A. C. R. 7-1, I do not remember the day (February or March, 1918).

Q. How much did you have in the company?

A. \$500.

Q. Whose interest did you buy?

A. No ones.

\* \* \* \*

Q. Did you pay for that \$500 share in this Quan Suey Lung Co.?

A. Yes.

Q. Whom did you give the money to?

A. To Quan Hay."

(Ex. A, pp. 57, 58 and 59.)

Quan Hay was questioned in the present case as follows:

“Q. When did Quan Sing become a partner in your firm?

A. C. R. 7, I think the first month.

Q. Was he ever a partner in your firm before that?

A. No.

Q. Do you remember when Quan Sing went to China in 1902?

A. Quan Sing went to China just one boat ahead of my return in K. S. 28 (1902).

Q. At that time he claimed that he had a \$500 interest in that firm, why did he make such a claim if you say he never joined the firm until 1918?

A. He didn't have any share there, he deposited some money there, all right.

Q. How much did he deposit?

A. I was in China at that time, but my partner told me he deposited that money. He left the United States for China one boat before I returned to the United States.

\* \* \* \*

Q. When did Quan Sing pay for his share?

A. C. R. 7-1.

Q. Is that as near as you can come to it?

A. Yes.

Q. How did he pay?

A. Delivered the money to me.”

(Ex. A, p. 40.)

From the above testimony it is clear that in 1902 and 1904 Quan Sing and Quan Chow recited a circumstantial story as to how and when the former became a member of the Quan Tsue Lung Company. Quan Sing, it is shown, was particularly concerned in his testimony in making it clear that he had an interest in the store and that the money, which he claims he paid to Quan Hay, was advanced to the firm not as a loan but as an investment in the business, whereby he became a partner in the firm.

If his connection with the Quan Tsue Lung Company commenced in 1892 and continued for ten years from that time as he said it did and he is now a member of the same store, his membership with the store would have been a matter of many years' standing. Yet his present testimony is that his membership dates from February or March, 1918, and that in 1902 he was not a member of the firm and had merely loaned the money mentioned in his 1902 testimony to Quan Jew, who used the money for the purpose of buying goods.

His 1902 testimony, confirmed by his 1904 testimony, when viewed in the light of his present statements, is susceptible of but one reasonable explanation. The conclusion, fairly to be reached, is that his former testimony and that of Quan Chow was false and that there was an agreed plan to offer testimony that Quan Sing was a member of the firm and was carried on the books and partnership list as a member to support said statements.



The testimony shows that on two occasions he testified that he has paid \$500 for an interest in the firm and that both times the payment was made to Quan Hay. If his 1902 and 1904 testimony was the truth no second transaction would be necessary to attain the same end, namely, membership in the firm. It is contended that the immigration authorities had sufficient ground to doubt the bona fides of the present claim of Quan Sing after consideration of the testimony hereinabove set forth.

In the present record it appears that the testimony of the three witnesses other than Chinese, who appeared in behalf of Quan Sing, fail to show that the latter was actively engaged in the business of the concern. Herbert E. Schultz, one of the witnesses, claims to have seen Quan Sing around the store for the past two years, but has never transacted any business with him nor has he seen him perform any active duties at the store.

Another witness, T. L. Dickinson, an expressman, testified that he had seen Quan Sing in the store and had been paid by him. However, when shown a number of photographs of Chinese, among which was a photograph of Quan Sing, he picked out a photograph of a Chinese known as Quan Chew Yeun as that of Quan Sing. The witness when shown photographs of two Chinese for whom he had testified within the previous three years, was unable to state where he had seen them or to give their names. He also failed to identify the photographs of several other alleged members of the firm.

A third witness, Ray Olds, who is also in the express business, claims to have seen Quan Sing around the store for the past two years and to have been paid by him for hauling. This witness has a poor knowledge of the firm and knows only about three of the alleged partners. He claims to have called at the store only about five or six times during the previous year, but states that he saw Quan Sing there almost every day, Olds' stand, where he waits for transfer trade, apparently being very close to the store.

It is clear that under the Act of November 3, 1893, Congress intended that claims to mercantile status made by Chinese should not rest on the testimony of Chinese alone, hence the provision under the act requiring in such cases the establishment of such claims by the testimony of two credible witnesses other than Chinese. In this case the immigration authorities found—rightly, it is contended—that the testimony offered by the witnesses was unsatisfactory.

In certain other aspects the case was regarded unfavorably by the immigration authorities. The following comment is made in the report of the Chairman of the Board of Review. (Ex. A, p. 100.)

“The business in question is located in Los Angeles, Cal. It is pictured as being a combination wholesale and retail business, although it might be mentioned that the bookkeeper and at least one of the witnesses appear to disagree

as to the retail feature of the company. It is alleged that there are seventeen members in this firm, thirteen active and four silent. One Quan Hay is the manager and one Quan Chew Yuen is given as the bookkeeper for the company. The business is stated to be capitalized at \$9,000, Quan Hay, the manager, having \$1,000 interest and the other sixteen partners having a \$500 interest. The store in question is said to be 16x14 and 16x16 feet in width and breadth. It is claimed that the firm does about a \$30,000 annual business. Accepting the sum of \$30,000 as being a reasonable estimate of the firm's annual business, this would mean that the entire firm does a weekly business of \$575, which, reduced further, would show a weekly business of \$34 for each member of the firm, further reducing this to the average daily business for each member of the firm would show daily gross sales of about \$5.60. \* \* \* It is difficult to understand why such a comparatively small business should require thirteen active and four silent partners, it appearing that the number of alleged partners is entirely out of proportion to the amount of business transacted."

The physical aspect of the store, the amount of business transacted, the earnings of the individual members, the number of partners engaged in the transaction of the business, were all matters pertinent to the issue in the case, in support of which we again refer to the decision of the Supreme Court in the case of *Tom Hong v. United States, supra*.

"The main purpose (of the act) is to require the person to be a *bona fide merchant*, having in

his own name and right an interest in a *REAL* mercantile business."

It is alleged in appellant's brief that one of the immigration officers who took testimony in the case was biased and prejudiced and conducted the examination in a manner which prevented a fair and impartial hearing. It is said that the report of this officer "evidences an indefinable and indescribable prejudice against the applicant's father and his firm."

The immigration officers charged with the duty of enforcing the Chinese-exclusion acts, in order to arrive at the truth are required to make a thorough examination into the facts of the cases presented. A mere superficial examination will not get at the truth in these cases. Usually the persons appearing before the officers are unknown to them and by the very nature of the case it must be upon the statements made by applicants and their witnesses that the officer's conclusions are reached. As was said in the case of *Lee Sing Far v. United States*, 94 Fed. 834:

"The only protection to the government in the enforcement of the exclusion act in this character of cases lies in the cross-examination of each witness on behalf of the petitioner, whereby the 'crucial test' of his credibility may be applied. It may or may not always be successful, but it has often been said to be one of the most efficacious tests which the law has devised for the discovery of truth."



The necessity of thoroughness in the examination of Chinese with respect to claims such as are presented in the instant case is obvious from the very nature of the cases. His Honor Judge Woods, in his dissenting opinion in the case of *Wong Yee Toon v. Stump*, 233 Fed 194, at page 199 says:

“Evidently the immigrant, especially a Chinaman, has great advantage of the government with respect to direct evidence. If he wishes to come under false claims, his oath and that of his relations and friends can rarely, if ever, be met by direct contradiction. The government will hardly ever be able to obtain direct evidence of paternity or other vital matters, and must of necessity rely on contradictions, inconsistencies, and other indirect and circumstantial evidence, if the law is to be enforced. The presumption is that immigration officers will not be arbitrary and unfair, and that they are selected for their intelligence and acquaintance with the manners and customs of the races with whose members they have to deal. They see and hear the witnesses, and may judge of their credibility by their manner and by their racial characteristics and habits. These considerations are suggestive of the greatest caution on the part of the courts in deciding that an immigrant is entitled to remain in this country, contrary to the findings of fact of the immigration officers making the examination, when findings have been subjected to the scrutiny and have received the approval of higher officers, including the Secretary of Labor.”



As an instance of the harassing methods used by the immigration officer, counsel cites the following:

“Q. Are you prepared to furnish a Chinese partnership list in quintuplicate, and its translation in octuplicate?”

A. Yes.”

The matter is very simply explained. It appears that in these cases various copies of the records must be made. Copies are retained at the place where the investigation is made and also at the port of entry. Additional copies are made for the use of the Secretary on appeal, and copies are loaned to the attorney of record for use in perfecting the appeal. The number of copies made in any case is governed by legitimate needs and is not a matter of caprice on the part of the examining officer, as counsel implies.

Examination of the record will show, it is contended, that while the examining officer was strict he was not unfair.

The charge of unfairness is vague and indefinite and general rather than specific. The Supreme Court, in the case of *Low Wah Suey v. Backus*, 225 U. S. 460, sets forth the guiding rule in such cases in the following language:

“In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were *manifestly* unfair, that the

action of the executive officers were such as to prevent a fair investigation or there was a manifest abuse of discretion committed to them by the statute.”

In this case it is contended that there was no unfairness, either on the part of the examining officer complained of, nor otherwise—certainly the record fails to show that the hearing was manifestly unfair.

It is further contended by counsel that the immigration authorities acted arbitrarily and abused their discretion in refusing to reopen the case for the consideration of further evidence. Before the case was closed it will be noted that an opportunity was given to submit further evidence (Ex. A, p. 77), and ten days was allowed for this purpose. The attorneys for the applicant, when advised of this action, expressly stated that they had no additional evidence to submit. (Ex. A, p. 78). Their later application to reopen the case was considered by the immigration authorities but was refused. (Ex. A, p. 115). This was clearly within the discretion of the administrative officers. *Toku Sakai v. United States*, 239 Fed 492. Chinese are not entitled to repeated hearings of the facts.

*U. S. v. Ng Young*, 126 Fed. 425.

The action of the District Court, wherein it directed that the writ issue conditional upon further consideration and action in the case by the Immigra-

tion authorities with respect to the relationship feature is clearly within the power of the Court.

*United States v. Petkos*, 214 Fed. 978;

*Ex parte Chin Loy You*, 223 Fed. 833;

*Lee Wong Him v. Mayo*, 240 Fed. 368;

*White v. Wong Quen Luck*, 243 Fed. 547.

*Ex parte Lalime*, 244 Fed. 279;

*Jeung Quey How v. White*, 254 Fed. 618.

It is respectfully submitted that the applicant was given the hearing to which he was entitled under the law; that he was afforded full and ample opportunity to present witnesses; that there was no unfairness on the part of the immigration authorities in the proceedings and that the decision reached was warranted by the evidence and that the decision of the lower court so finding should be sustained.

Respectfully submitted,

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*Attorneys for Appellee.*

Dated: San Francisco, March 10, 1924.

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

HON WON CHONG and GEE SUE TOM,  
Plaintiffs in Error,  
VS.

UNITED STATES OF AMERICA,  
Defendant in Error.

**Transcript of Record.**

Upon Writ of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
First Division.





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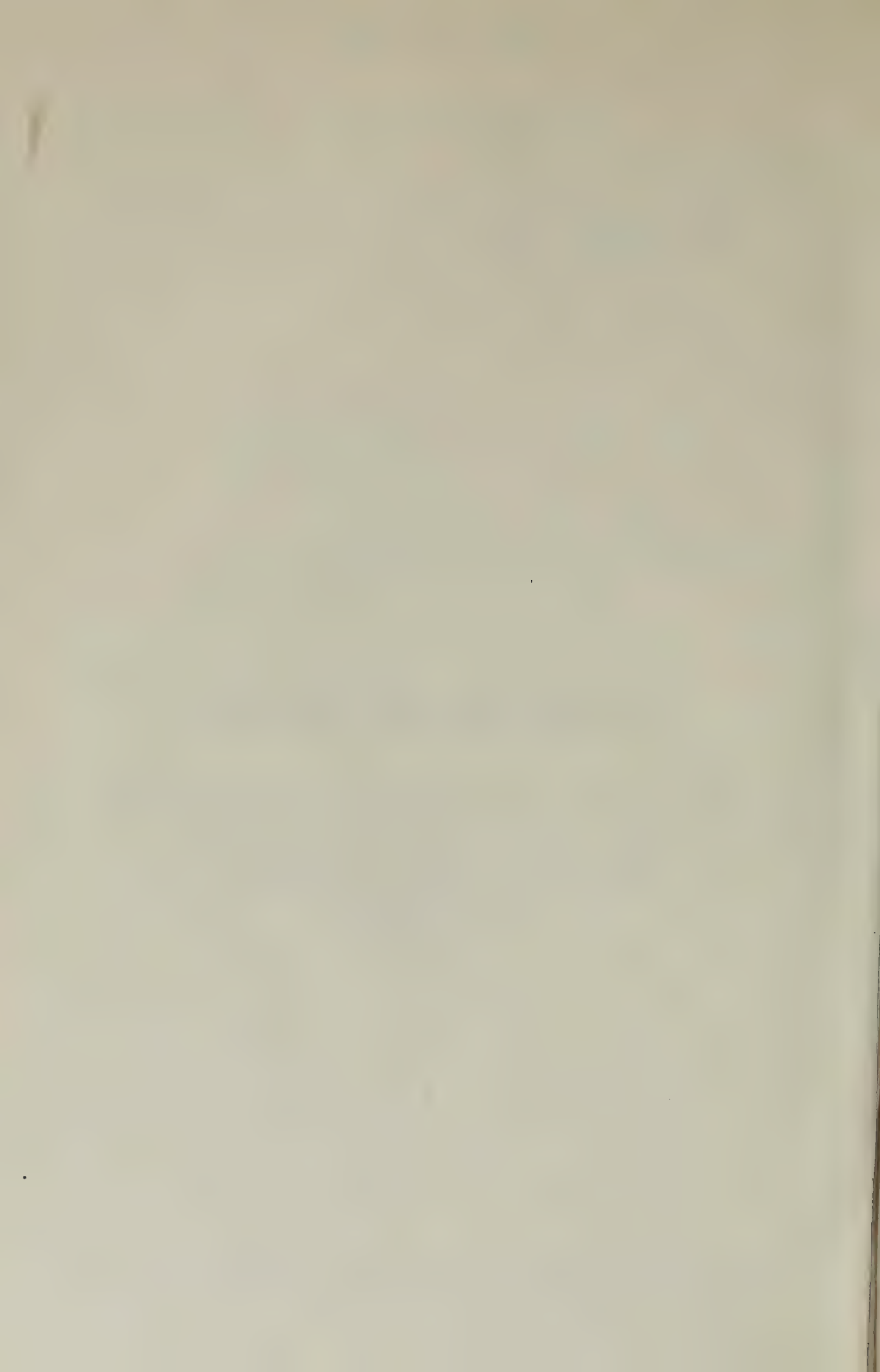
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

For Defendant and Plaintiff in Error—Hon Won Chong:

ROY L. DAILY, Esq., San Francisco.

For Defendant and Plaintiff in Error—Gee Sue Tom:

C. A. A. McGEE., Esq., and J. H. SA-PIRO, Esq., San Francisco.

For Plaintiff and Defendant in Error:

UNITED STATES ATTORNEY, S. F.

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In the Southern Division of the District Court of the United States, Northern District of California, First Division.

11,132 and 11,785.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HON WON CHONG, etc., and GEE SUE TOM,  
etc.,

Defendants.

**Praeceptum for Transcript on Writ of Error.**

To the Clerk of said Court:

Sir: Please prepare transcript on writ of error to include the following papers and proceedings:

Indictment in case No. 11,132.

Indictment in case No. 11,785.

Minute orders of the following dates: July 6th  
and Oct. 11, 1922, March 22, 23, 27, 28, April  
7, 1923.

Verdict.

Motion in arrest of judgment.

Judgment.

Bond on appeal of Hon Won Chong.

Bond on appeal of Gee Sue Tom.

Bond for costs on appeal.

Petition for writ of error.

Assignment of errors.

Order allowing writ of error.

Bill of exceptions.

This praecipe.

C. A. A. McGEE and

J. H. SAPIRO,

Attorneys for Defendant Gee Sue Tom.

R. L. DAILY,

Attorneys for Defendant Hon Wong Chong.

[Endorsed]: Filed Aug. 9, 1923. Walter B.  
Maling, Clerk. By C. M. Taylor, Deputy Clerk.  
[1\*]

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In the Southern Division of the United States  
District Court for the Northern District of  
California, First Division.

**(Indictment—No. 11,132.)**

At a stated term of said Court begun and holden  
at the city and county of San Francisco within and

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\*Page-number appearing at foot of page of original certified Transcript of Record.

for the Southern Division of the Northern District of California on the first Monday of March in the year of our Lord one thousand nine hundred and twenty-two,—

The Grand Jurors of the United States of America, within and for the Division and District aforesaid, on their oaths present: THAT

HON WON CHONG, *alias* F. T. Henry, and  
GEE SUE TOM, *alias* Gee Toy,

hereinafter called the defendants, heretofore, to wit, on or about May 1, 1922, at San Francisco, in the Southern Division of the Northern District of California then and there being, did then and there unlawfully, wilfully, knowingly and feloniously conspire, combine, confederate and agree together, with, between and among themselves, and with divers other persons to the grand jurors aforesaid, unknown, to commit the acts made offenses and crimes by the laws of the United States, to wit, the Act of Congress of December 17th, 1914, as amended February 24th, 1919, that is to say: The said defendants, did, at the time and place aforesaid, knowingly, unlawfully, wilfully, and feloniously conspire, combine, confederate and agree together, with, between and among themselves, and with divers other persons to the grand jurors aforesaid, unknown, to unlawfully, wilfully and feloniously possess certain narcotic drugs, to wit, smoking opium, cocaine, and morphine which said narcotic drugs did not then and there bear and have affixed thereon appropriate tax-paid stamps as required by the aforesaid act of Congress. [2]

That said conspiracy, combination, confederation and agreement between the said defendants and the said divers other persons whose names are as aforesaid, to the grand jurors aforesaid, unknown, was continuously, throughout all of the time from and after the said 1st day of May, 1922, and at all of the times in this indictment mentioned and referred to, and particularly at the time of the commission of the overt act in this indictment hereinafter set forth, in existence and process of execution.

And the grand jurors aforesaid, on their oaths aforesaid, do further state, that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendants, and each of them, did, on or about May 1, 1922, at San Francisco, in the Southern Division of the Northern District of California then and there being, unlawfully, wilfully and feloniously possess certain packages of narcotic drugs, to wit, 10-5 tael cans of smoking opium, 8 ounces of cocaine and 5 boxes of morphine, one ounce each, which said packages of narcotic drugs did not then and there bear and have affixed thereon appropriate tax-paid stamps as required by the aforesaid act of Congress.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the



statute of the said United States of America in such case made and provided.

JOHN T. WILLIAMS,  
United States Attorney.  
By GROVE J. FINK,  
Asst. U. S. Attorney.

[Endorsed]: A true bill.

H. K. MOFFITT,  
Foreman.

Presented in open court and ordered filed May 16, 1922. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [3]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

**Indictment—No. 11,785.**

At a stated term of said Court begun and holden at the city and county of San Francisco within and for the Southern Division of the Northern District of California on the second Monday of July in the year of our Lord one thousand nine hundred and twenty-two,—

The grand jurors of the United States of America, within and for the Division and District aforesaid, on their oaths present: THAT

HON WON CHONG, *alias* F. T. Henry, and GEE SUE TOM, *alias* Gee Toy,  
hereinafter called the defendants, heretofore, to

wit, on or about May 1, 1922, at San Francisco, in the Southern Division of the Northern District of California then and there being, did then and there unlawfully, wilfully, knowingly and feloniously conspire, combine, confederate and agree together, with, between and among themselves, and with divers other persons to the grand jurors aforesaid, unknown, to commit the acts made offenses and crimes by the laws of the United States, to wit, the Act of Congress of December 17th, 1914, as amended February 24th, 1919, that is to say: The said defendants did, at the time and place aforesaid, knowingly, unlawfully, wilfully and feloniously conspire, combine, confederate and agree together, with, between and among themselves, and with divers other persons to the grand jurors aforesaid, unknown, to unlawfully, wilfully and feloniously have in their possession certain narcotic drugs, to wit, smoking opium, cocaine, and morphine, said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid as amended, and said defendants not then and there having registered under the provisions of the said Act, and not then and there having [4] paid the special tax provided for by the aforesaid Act on the said smoking opium, cocaine and morphine.

That said conspiracy, combination, confederation and agreement between the said defendants and the said divers other persons whose names are as aforesaid, to the grand jurors aforesaid, unknown, was continuously, throughout all of the

time from and after the said 1st day of May, 1922, and at all of the times in this indictment mentioned and referred to, and particularly at the time of the commission of the overt act in this indictment hereinafter set forth, in existence and process of execution.

And the grand jurors aforesaid, on their oaths aforesaid, do further state, that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendants and each of them, did, on or about May 1, 1922, at San Francisco, in the Southern Division of the Northern District of California, then and there being, unlawfully, wilfully, and feloniously have in their possession a certain derivative of coca leaves, to wit, 8 ounces of cocaine, and a certain preparation and derivative of opium, to wit, ten 5-tael cans of smoking opium and five boxes of morphine, one ounce each, said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid as amended, and said defendants not then and there having registered under the provisions of the said Act, and not then and there having paid the special tax provided for by the aforesaid Act on the said cocaine, smoking opium and morphine.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the

statute of the said United States of America in such case made and provided.

JOHN T. WILLIAMS,  
United States Attorney.  
By GROVE J. FINK,  
Assistant U. S. Attorney.

[Endorsed]: A true bill.

C. A. GRAHAM,  
Foreman.

Presented in open court and ordered filed Sep. 29, 1922. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [5]

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At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 6th day of July, in the year of our Lord one thousand nine hundred and twenty-two. Present: the Honorable MAURICE T. DOOLING, District Judge.

No. 11,132.

UNITED STATES OF AMERICA

vs.

GEE SUE TOM, etc., et al.

**Minutes of Court—July 6, 1922—Arraignment and  
Plea—(Gee Sue Tom).**

In this case the defendant Gee Sue Tom was



present in court with his attorney, O. P. Stidger, Esq. G. J. Fink, Esq., Asst. U. S. Atty., was present for and on behalf of the United States. Defendant was duly arraigned upon indictment filed herein, stated true name to be as contained therein, waived formal reading thereof and thereupon pleaded "Not Guilty" of offense charged, which plea the Court ordered and the same is hereby entered and case continued to Jul. 15, 1922, to be set for trial.

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At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 24th day of May, in the year of our Lord, one thousand nine hundred and twenty-two. Present: the Honorable MAURICE T. DOOLING, District Judge.

No. 11,132.

UNITED STATES OF AMERICA

vs.

HON WON CHONG, etc., et al.

**Minutes of Court—May 24, 1922—Arraignment and Plea—(Hon Wong Chong).**

This case came on regularly this day for arraignment of defendant Hon Won Chong who was present in court with his attorney, O. P. Stidger, Esq. G. J. Fink, Esq., Asst. U. S. Atty., was present for



and on behalf of the United States. Said defendant was duly arraigned upon the indictment filed herein, stated his true name to be as contained therein, waived formal reading thereof and thereupon plead "Not Guilty" of offense charged, which plea the Court ordered and the same is hereby entered, and case continued to May 27, 1922, to be set for trial. On motion of Mr. Stidger, further ordered that the amount of bond for appearance of said defendant herein be and the same is hereby reduced to sum of Fifteen Hundred (\$1500.00) Dollars. [6]

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At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 11th day of October, in the year of our Lord one thousand nine hundred and twenty-two. Present: the Honorable WILLIAM H. HUNT, Judge, United States Circuit Court of Appeals for the Ninth Circuit, sitting in the District Court.

No. 11,785.

UNITED STATES OF AMERICA

vs.

HON WON CHONG and GEE SUE TOM.

**Minutes of Court—October 11, 1922—Arraignment and Pleas.**

In this case the defendants were present in court with their respective attorneys. G. J. Fink, Esq., Asst. U. S. Atty., was present for and on behalf of the United States. Each defendant was duly arraigned upon the indictment filed herein, stated true names to be as contained therein, waived formal reading thereof and thereupon each plead "Not Guilty" of offense charged, which pleas the Court ordered and the same are hereby entered. After hearing attorneys, further ordered case continued to Oct. 28, 1922, to be set for trial and that defendants go at large upon their own recognizance. [7]

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At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 22d day of March, in the year of our Lord, one thousand nine hundred and twenty-three. Present: The Honorable JOHN S. PARTRIDGE, District Judge.

No. 11,132.

UNITED STATES OF AMERICA

vs.

HON WON CHONG and GEE SUE TOM.

**Minutes of Court—March 22, 1923—Trial.**

This case came on regularly for trial of defendants, Hon Won Chong and Gee Sue Tom, upon the indictment filed herein against them. Said defendant Hon Won Chong was present with Attorney Roy L. Daily, Esq., and defendant Gee Sue Tom appeared with Attorneys C. A. A. McGee and I. H. Sapiro, Esqs. G. J. Fink, Esq., Asst. U. S. Atty., was present for and on behalf of the United States. Upon calling of case, all parties answering ready for trial, the Court ordered that the same proceed and that the jury-box be filled from the regular panel of trial jurors of this Court. Accordingly, the hereinafter named persons, having been called by lot, sworn, examined and accepted, were duly sworn to try the issues herein, viz.:

Frank Craig,	Chas. M. Boynton,
Walter E. McGuire,	C. D. Carman,
George Dias,	Wm. E. Haley,
Basil N. Rittenhouse,	Berrien P. Anderson,
Manuel V. Silva,	Arthur C. Folsom,
L. F. Weber,	Robert Howden.

Mr. Fink made statement as to the nature of the case and called J. M. Kirkley as a witness on behalf of the United States, who was duly sworn and examined.

Thereupon the attorneys for defendants moved the Court to dismiss indictment or to instruct Jury to return verdict of not guilty as to each defendant, and after hearing attorneys, the Court ordered said motions denied and to which order exceptions were entered. [8]

Mr. Fink then called H. Haley, who was duly sworn and examined as a witness on behalf of the United States, and offered in evidence a certain envelope which was filed and marked U. S. Exhibit No. 1, also offered for identification a suitcase which was marked U. S. Exhibit No. 2 for identification. Mr. Fink also introduced in evidence on behalf of the United States certain exhibits, which were filed and marked U. S. Exhibits Nos. 3 (tag), 4 (registered letter), 5 (ticket), 6 (valuation slip) and 7 (blank paper with punch-mark).

Thereupon the Court, after admonishing the jury herein, ordered that the further trial of defendants upon said indictment be and the same is hereby continued to Mar. 23, 1923, at 11 A. M. Further ordered, on motion of Mr. Fink, that all witnesses subpoenaed in this case appear on said Mar. 23, 1923, at 11 A. M. [9]

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At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 23d day of March, in the year of our Lord, one thousand nine hundred and twenty-three. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 11,132.

UNITED STATES OF AMERICA.

vs.

HON WON CHONG et al.



**Minutes of Court—March 23, 1923—Trial (Continued).**

This case came on regularly this day for the further trial of defendants upon indictment filed herein against them. Defendant Hon Won Chong was present with Attorney Roy L. Daily, Esq., and defendant Gee Sue Tom appeared with Attorneys C. A. A. McGee and I. H. Sapiro, Esqs., G. J. Fink, Esq., Asst. U. S. Atty., was present for and on behalf of the United States. The jury heretofore impaneled and sworn to try defendants herein was present and complete.

Mr. Fink, on behalf of the United States, recalled H. Haley, who was further examined, and then called John Ohman, G. W. O'Neill, F. D. Stribling, H. S. Keyes, A. W. Roberts and J. H. Nichols, each of whom was duly sworn as a witness for the United States and examined, and introduced on behalf of the United States certain exhibits heretofore filed for identification, which were marked U. S. Exhibits Nos. 4, 5, 2, 6 and 3, and introduced in evidence another exhibit which was filed and marked U. S. Exhibit No. 8 (card), and thereupon rested case of United States.

Attorneys for defendants thereupon, on behalf of defendants, moved the Court for order instructing jury to return verdict of not guilty. After hearing attorneys, the Court ordered said motion denied and to which order an exception was entered.

Attorneys for defendants thereupon moved the Court for order quashing indictment herein. [10]



After hearing attorneys and after admonishing the jury herein, the Court ordered that the further trial of defendants upon indictment herein be and the same is hereby continued to Mar. 27, 1923, at 11 A. M., and that all parties be and appear on said day accordingly. [11]

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At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Tuesday, the 27th day of March, in the year of our Lord, one thousand nine hundred and twenty-three. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 11,132.

UNITED STATES OF AMERICA

vs.

HON WON CHONG, etc., et al.

**Minutes of Court—March 27, 1923—Trial (Continued).**

This case came on regularly for further trial of defendants, Hon Won Chong and Gee Sue Tom upon indictment filed herein against them. Said defendants were present with their respective attorneys, viz.: defendant Hon Won Chong with Attorney Roy L. Daily, Esq., and Defendant Gee Sue Tom with Attorneys C. A. A. McGee and I. H. Sapiro, Esqs. G. J. Fink, Esq., Asst. U. S. Atty., was present for and on behalf of the United States.

The jury heretofore impaneled and sworn to try defendants was present and complete.

Mr. Fink moved the Court order denying motion of defendants to quash indictment, and thereupon moved the Court for an order consolidating case of United States of America, vs. Hon Won Chong and Gee Sue Tom, No. 11,785, herewith for trial. After hearing objection of attorneys on behalf of defendants and arguments of counsel, the Court ordered that the motion to dismiss or quash indictment be and the same is hereby denied, and that the motion to consolidate be and the same is hereby granted *nunc pro tunc* as of commencement of trial of this case and that the trial of this and consolidated case proceed. Attorneys on behalf of each defendant thereupon entered exception to said order and moved the Court for order quashing and abating indictments as consolidated and for order instructing jury to return [12] verdict of not guilty as to each defendant as to indictments as consolidated, which motions the Court ordered denied. Attorneys for defendants thereupon, on behalf of each defendant, entered plea in bar under indictment No. 11,132, which pleas the Court ordered overruled.

Thereupon the Court ordered that trial proceed. Mr. Fink recalled J. H. McNichols as a witness on behalf of the United States, who was further examined, and introduced in evidence on behalf of the United States an exhibit which was filed and marked U. S. Exhibit No. 9 (book) and also introduced, as to consolidated case, certain evidence heretofore presented and thereupon rested case of United States.

H. Embert Lee was called and duly sworn as interpreter.

Attorneys for defendants called Hon Won Chong (defendant) and Gee Sue Tom (defendant), each of whom was duly sworn and examined as a witness on behalf of defendants, and introduced in evidence on behalf of defendants certain exhibits which were filed and marked Defendants' Exhibits "A," "B" and "C" (Certificates). Case was thereupon rested as to defendants. [13]

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At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 28th day of March, in the year of our Lord, one thousand nine hundred and twenty-three. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 11,132.

UNITED STATES OF AMERICA

vs.

HON WON CHONG and GEE SUE TOM.

**Minutes of Court—March 28, 1923—Trial (Continued).**

The trial of this case and consolidated case of United States of America vs. Hon Won Chong and Gee Sue Tom, No. 11,785, was resumed. The jury heretofore impaneled was present and complete.

G. J. Fink, Esq., and Miss Alma M. Meyers, Asst. U. S. Attys., were present for and on behalf of the United States. Defendant Hon Won Chong was present with Attorney Roy L. Daily, Esq., and defendant Gee Sue Tom appeared with Attorneys I. H. Sapiro and C. A. A. McGee, Esqs.

Mr. Fink, on behalf of the United States, recalled H. S. Keyes, who was further examined, and then P. A. Robbins, in rebuttal, who was duly sworn and examined, and then recalled A. W. Roberts, H. Haley and J. M. Kirkley, who were further examined, and rested case of United States.

Mr. Daily recalled defendant, Hon Won Chong, who was further examined.

Thereupon counsel on behalf of each defendant renewed motions to quash indictments and for order instruction jury to return verdict of not guilty as to each defendant as to indictments as consolidated, which motions the Court ordered and the same are hereby denied, and to which order exceptions were entered. [14]

Case was then argued by Miss Meyers, Mr. McGee, Mr. Sapiro and Mr. Fink and submitted, whereupon the Court proceeded to instruct the jury herein, who, after geing so instructed, retired at 5:50 P. M., to deliberate upon a verdict, and returned at 6:25 P. M., and upon being called all twelve (12) jurors answered to their names and were found to be present, and in answer to question of the Court, stated they had agreed upon a verdict and presented a written verdict, which the Court ordered filed and recorded, viz.:



“No. 11,132—11,785.

We, the Jury, find as to the defendants at the Bar, as follows: Guilty as charged. Hon Won Chong—Gee Sue Tom.

FRANK CRAIG,  
Foreman.”

Thereupon, at the request of counsel for defendants, the Court ordered jury polled and accordingly the jury was duly polled and each juror answered that the verdict as recorded was his verdict.

Thereupon the Court ordered that the jurors be and they are hereby discharged from further consideration of this case and from attendance upon the Court until March 29, 1923, at 11 A. M.

After hearing attorneys, the Court ordered case continued to April 7, 1923, for pronouncing of judgments. On motion of Mr. Fink and over objections of counsel for defendants, further ordered that defendants, in default of a total bond for appearance in sum of Five Thousand (\$5,000.00) Dollars as to each defendant, stand committed to custody of U. S. Marshal and that *mittimus* issue.  
[15]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

Nos. 11,132—11,785.

THE UNITED STATES OF AMERICA

vs.

HON WON CHONG and GEE SUE TOM.



**(Verdict.)**

We, the Jury, find as to the defendants at the bar as follows: Guilty as Charged. Hon Won Chong—Gee Sue Tom.

FRANK CRAIG,  
Foreman.

[Endorsed]: Filed Mch. 28, 1923, at 6 o'clock and 25 minutes P. M. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [16]

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In the Southern Division of the United States  
District Court for the Northern District of  
California, First Division.

No. 11,132.

UNITED STATES OF AMERICA

vs.

HONG WON CHONG and GEE SUE TOM,  
Defendants.

**Motion in Arrest of Judgment.**

Come now Hong Won Chong and Gee Sue Tom, the defendants in the above-styled and numbered cause, and against whom a verdict of guilty was rendered in said cause on the 27th day of March, 1923, and each of said defendants for himself moves the court to arrest the judgment against him and each of them and hold for naught the verdict of guilty rendered against him for the following reasons:

## 1.

Because the bill of indictment in this cause is insufficient to support any judgment against him, in this: the indictment contains but one count, and by such indictment it is sought to charge him and the other defendant with an unlawful conspiracy to violate a law of the United States. Such indictment is insufficient to charge a conspiracy to violate a law of the United States, in that the purpose or object of the conspiracy is not set out with sufficient or proper clearness or certainty. The indictment charges that the said defendants did knowingly, unlawfully, wilfully and feloniously conspire, combine, confederate and agree together, with, between and among themselves, and with divers other persons to the grand jurors aforesaid, unknown, to unlawfully, wilfully and feloniously have in their possession certain narcotic drugs, etc., and does not further describe, declare or set out the object or purpose of the conspiracy. The ownership of such goods is not alleged; no facts are alleged from which it can be determined by an inspection of the indictment [17] how or in which manner the alleged possession was unlawful, and all the allegations are mere conclusions of law and are consistent with lawful and rightful possession.

## 2.

Because no facts are alleged in the said indictment from which it can be determined by an inspection of the indictment that the overt acts charged to have been committed by the defendants Hon Won Chong and Gee Sue Tom, or either of them, were

committed in pursuance of or to effect the object of the alleged conspiracy. In other words, no facts are alleged in the said indictment from which it is made to appear from an inspection of the said indictment from which it can be determined that the purpose or object of the alleged conspiracy was to possess certain narcotics unlawfully and feloniously; that the said indictment is vague, uncertain, indefinite and insufficient, in that the same does not sufficiently aver or state the elements of the alleged crime or offense charged therein, nor the ingredients of which said alleged crime or offense is composed; that no unlawful means, or any means, are set out in said indictment used by said defendants, or either of them in carrying out the alleged conspiracy or combination.

3.

That neither said indictment nor any part thereof, alleges any fact or facts showing that the defendants or either of them was a party to any unlawful contract, conspiracy, or combination to violate the Act of Congress of December 17th, 1914, as amended February 24th, 1919, or any other law of the United States. That the allegations charging said defendants and each of *the* them, in said indictment, and in each and every part thereof with a conspiracy, are conclusions of law.

4.

Because it does not appear from the allegations of the said indictment with sufficient clearness of certainty, or from [18] the allegations of facts in said indictment that the object or purpose of the

alleged conspiracy was to commit an offense against the law of the United States, and that some overt act was committed by one of the alleged conspirators in furtherance of or for the purpose of carrying out the alleged conspiracy.

## 5.

Because on the trial of this cause the evidence was insufficient to show jurisdiction in this court to hear and determine this cause. That it affirmatively appears from the record and minutes of the court, that an objection was interposed by the defendants and each of them, to the introduction of any testimony after the first witness was sworn, on the ground that the indictment did not state facts sufficient to charge a public offense, and motion was made to quash the indictment; that after the Government rested, both of said motions were renewed, and motion was made that the Court direct the jury to return a verdict of not guilty; that the Court on motion of the District Attorney, consolidated or substituted an indictment numbered 11785, with or for the indictment under which these defendants were being tried; that both of said indictments are now pending and neither has been dismissed; that said action of the Court was unwarranted in law and in violation of the constitutional guaranties of the defendants and each of them; that the defendants have never been apprised, nor are they now, nor can they ascertain under which indictment the jury have found a verdict of guilty; that if this Honorable Court ever did have jurisdiction of this cause, the same was lost when the motion to quash



and direct the jury to return a verdict of not guilty was interposed by the defendants.

6.

That neither the first indictment No. 11132, or *the* the second indictment No. 11785, nor the consolidated indictment, do not show the commission of any offense by the defendants or either of them, against any law of the United States, for the [19] reasons heretofore set forth in paragraphs 1, 2, 3, and 4 of this motion.

7.

The verdict of the jury is not supported by the evidence in the case.

8.

The evidence in the case does not prove, or tend to prove that the said Hon Won Chong and the said Gee Sue Tom, or any or either of them, was a member of the said conspiracy charged in the indictment.

9.

The evidence does not prove, or tend to prove, that there ever was a conspiracy or agreement as alleged in the indictment.

10.

The evidence in the case does not prove, or tend to prove that the said Hon Won Chong and Gee Sue Tom, or any or either of them, was guilty of the offense charged in the indictment.

11.

The verdict in said case, if supported by any evidence at all, is not sustained by sufficient evidence, and is contrary to the manifest weight of the evidence.



The defendants and each of them therefore pray that this motion be sustained, and that the judgment of conviction against him and each of them be arrested and held for naught and that he have all such other orders as may be just or proper in the premises, and he will ever pray.

Dated April 7, 1923.

ROY L. DAILY,  
Attorney for the Defendant Hon Won Chong, etc.  
McGEE & SAPIRO,  
Attorneys for the Defendant Gee Sue Tom, etc.

[Endorsed]: Filed Apr. 7, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[20]

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At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 7th day of April, in the year of our Lord, one thousand nine hundred and twenty-three. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 11,132—No. 11,785.

UNITED STATES OF AMERICA

vs.

HON WON CHONG and GEE SUE TOM.

**Minutes of Court—April 7, 1923—Judgment.**

This cause, as heretofore consolidated with case of United States of America, vs. Hon Won Chong and Gee Sue Tom, No. 11,785, came on regularly this day for pronouncing of judgments. The defendants, Hon Won Chong and Gee Sue Tom, were present with their attorney J. H. Sapiro, Esq., and in custody of the U. S. Marshal. G. J. Fink, Esq., Asst. U. S. Atty., was present for and on behalf of the United States. Defendants were called for judgment, duly informed by the Court of the nature of indictments filed herein against them, or their arraignments, pleas and verdict of the jury. Defendants were then asked if they had any legal cause to show why judgment should not be entered and thereupon Mr. Sapiro presented motion in arrest of judgment, and after hearing attorneys, the Court ordered said motion denied and to which order exception was entered. Thereupon, no sufficient cause appearing why judgment should not be pronounced, the Court ordered that said defendants Hon Won Chong and Gee Sue Tom, for offense of which they stand convicted each be imprisoned for period of two (2) years in the United States Penitentiary at McNeil Island, State of Washington. Further ordered that said defendants stand committed to custody of U. S. Marshal for this district to execute said judgments, and that commitments issue. [21]

Further ordered that execution of judgments be stayed for a period of thirty (30) days, and that

defendants, in default of bond in sum of \$5,000.00 each, pending determination of appeal, stand committed. [22]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

Nos. 11,132—11,785.

THE UNITED STATES OF AMERICA

vs.

HON WON CHONG and GEE SUE TOM, *alias*  
GEE TOY.

**Judgment on Verdict of Guilty.**

Grove J. Fink, Esq., Assistant United States Attorney, and the defendants with their counsel came into court. The defendants were duly informed by the Court of the nature of the indictments filed on the 16th day of May, 1922, and Sept. 29, 1922, charging them with the crime of conspiracy—Viol. Harrison Narcotic Act—Act Dec. 17, 1914, as amended; of their arraignment and plea of not guilty; of their trial and the verdict of the jury on the 28th day of March, 1923, to wit:

“Nos. 11132—11785.

We, the Jury, find as to the defendants at the bar as follows: Guilty as charged.

FRANK CRAIG,  
Foreman.”

The defendants were then asked if they had any

legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion in arrest of judgment; thereupon the Court rendered its judgment:

THAT, WHEREAS, the said Hon Won Chong and Gee Sue Tom having been duly convicted in this court of the crime of conspiracy—Viol. Harrison Narcotic Act—Act Dec. 17, 1914 as am.;

IT IS THEREFORE ORDERED AND ADJUDGED that the said Hon Won Chong and Gee Sue Tom each be imprisoned for the period of two (2) years in the United States Penitentiary at McNeil Island, State of Washington. [23]

Judgment entered this 7th day of April, A. D. 1923.

WALTER B. MALING,  
Clerk.

By C. W. Calbreath,  
Deputy Clerk.

[Endorsed]: Entered in Vol. 14 Judg. and Decrees, at page 322. [24]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

Nos. 11,132—11,785.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HON WON CHONG, *alias* F. T. HENRY, and  
GEE SUE TOM, *alias* GEE TOY,

Defendants.

**Petition for Writ of Error.**

Now come your petitioners, Gee Sue Tom and Hon Won Chong, the defendants herein and bring this petition for a writ of error to the District Court of the United States in and for the Northern District of California, First Division, and in that behalf your petitioners respectfully show:

That, on the 7th day of April, 1923, there was made, given, and rendered in the above-entitled court, a judgment and sentence against the defendants, your petitioners, wherein and whereby your petitioners, said defendants were adjudged and sentenced to imprisonment, to wit, the said Gee Sue Tom and the said Hon Won Chong each to be imprisoned for the term of twenty-four months in the Federal Prison at McNeil's Island; and said defendants your petitioners show that they are advised by counsel, and they aver, that there was and is manifest errors in the record and proceedings



had prior thereto in said cause and in the making, giving, and rendition and entry of said judgments and sentences, to the great injury and damage of your petitioners, all of which errors will be more fully made to appear by an examination of the bill of exceptions to be tendered and filed and in the assignment of errors hereinafter set out and to be presented herewith; and to that end thereafter, that the said judgment, sentence, and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your [25] petitioners now pray that a writ of error may be issued directed therefrom to the District Court of the United States for the Northern District of California, returnable according to law and the practice of this court, and that there may be directed to be returned, pursuant thereto, a true copy of the record, bill of exceptions, assignment of errors, and all proceedings had in said cause, and that the same may be removed to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that error, if any has happened, may be duly corrected and full and speedy justice done your petitioners.

And your petitioners make the assignment of errors presented herewith, upon which they will rely and which will be made to appear by a return of the said record, in obedience to the said writ.

Wherefore, your petitioners pray the issuance of a writ as herein prayed, and pray that the assignment of errors, as entered herewith may be considered as their assignment of errors upon the writ, and that the judgment rendered in this cause may

be reversed and held for naught, and that said cause be remanded for further proceedings, and that they may be awarded a supersedeas upon said judgment and all necessary and proper process, including bail.

Dated April 28, 1923.

GEE SUE TOM.

HON WON CHONG.

C. A. A. McGEE and

J. H. SAPIRO,

Attorneys for Defendant Gee Sue Tom.

R. L. DAILY,

Attorney for Defendant Hon Won Chong.

Due and legal service of the above and foregoing petition for writ of error and receipt of a copy thereof is hereby accepted and admitted in the city and county of San Francisco, State of California, this 28th day of April, 1923.

\_\_\_\_\_,  
United States Attorney.

By \_\_\_\_\_. [26]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

Nos. 11,132 and 11,785.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HON WON CHONG, *alias* F. T. HENRY, and  
GEE SUE TOM, *alias* GEE TOY,

Defendants.

**Assignment of Errors of Defendants Gee Sue Tom  
and Hon Won Chong.**

Gee Sue Tom and Hon Won Chong, the defendants in the above-entitled cause, and plaintiff in error herein, having petitioned for an order from said Court permitting them to procure a writ of error to this court, directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence entered in said cause against the said Gee Sue Tom and Hong Wong Chong now make and file with their said petition the following assignment of errors herein, upon which they will apply for a reversal of said judgment and sentence upon the said writ, and which said error, and each and every of them, are to the great detriment, injury, and prejudice of the said defendants and in violation of the rights conferred upon them by law; and they say that in the record and proceedings in the above-entitled cause,

upon the hearing and determination thereof in the District Court of the United States for the Northern District of California there is manifest error, in this, to wit:

## I.

The Court erred in admitting the introduction of any testimony under the indictment on the ground that the same does not state facts sufficient to charge a public offense, and the [27] Court erred in overruling and denying the defendant's motion to quash the indictment because the indictment does not charge any offense under the laws of the United States.

“Questions by Mr. FINK.—Mr. Kirley, what is your occupation?

“Mr. SAPIRO.—Just a moment. Comes now the defendant, Gee Sue Tom and objects to the introduction of any testimony under the indictment on the ground that the same does not state facts sufficient to charge a public offense. And further moves the Court to quash the indictment at this time because the indictment does not charge any offense under the laws of the United States and because the said indictment does not set forth how or in what manner the alleged possession of narcotics was unlawful, and furthermore that the indictment does not state facts showing that the alleged possession was accompanied by such a purpose or intent or under such circumstances as to render it a violation of any law. The facts averred are consistent with the alleged possession of narcotics being a legally permitted one. . . .



The COURT.—Motion denied, objection overruled.”

“Exception saved.”

## II.

The Court erred in admitting the following testimony over the objection of counsel for defendant upon the ground that it was incompetent, irrelevant and immaterial.

“Q. And can you now fix the date of delivery of a special delivery letter to this defendant prior—the last one prior to May 3d, 1922?

“Mr. McGEE.—Objected to as incompetent, irrelevant, and immaterial.

“A. No, I cannot.

“COURT.—What is the point, Mr. McGee?

“Mr. McGEE.—Why, it has no bearing upon the matter charged in the indictment, conspiracy. Suppose he has received a dozen special [28] delivery letters, what bearing would it have upon this unless the letter itself was introduced in evidence and connects this defendant with the alleged coconspirator?

“COURT.—That would be a matter of weight of the evidence. Evidence of similar transactions in a conspiracy trial is always admissible. Objection overruled; exception saved.

“Q. What was your answer? A. I would say about—either the last of April or the first of May, I am not sure which.”

## III.

The Court erred in overruling and denying motion of defendant to strike out the testimony above



quoted upon the grounds in said motion taken and assigned, to wit:

“Mr. McGEE.—Now, your Honor, at this time we move that the testimony of this witness given in chief and on his cross-examination with reference to other special delivery letters be stricken from the record and all testimony relative to it be stricken from the record and the jury instructed to disregard it for the reason that it develops that there is a record at Reno, in the post-office, showing the time, place and whom the letters were addressed and is the best evidence and is the only evidence that will enable us to adequately protect the interest of the defendant. And for the further reason that it now appears that some of these letters which he now testifies were addressed to other persons or concerns and there is no evidence that it was in the same handwriting as the address on Government’s Exhibit 1, alleged to have been delivered on May 3d.

“COURT.—As to the first part, the best evidence rule applies only when it is sought to show the contents of writing. The testimony of the witness was as to the physical fact. And the second point, it is for the jury to draw any proper inference they may see fit from the delivery of letters to the same place.

“Motion overruled; exception saved.” [29]

#### IV.

That the Court erred in overruling and denying defendants’ motion that the Court direct the jury to find them, the said Gee Sue Tom and the said

Hong Won Chong, not guilty upon the grounds in said motion taken and assigned, to wit:

“1. That the evidence adduced fails to prove a conspiracy as charged in the indictment, for which the defendant could be liable in law to be put upon trial, convicted and punished;

“2. That the evidence fails to prove that the defendant, Gee Sue Tom, was at any time connected with the, or any conspiracy, if any, as charged in the indictment;

“3. That the evidence does not tend to prove that the defendant, Gee Sue Tom, was guilty in the manner and form as charged in the indictment, or at all;

“4. That the indictment charges a conspiracy by the defendant to unlawfully possess certain narcotic drugs, to wit: 8 ounces of cocaine, ten five-  
tael cans of smoking opium, five one-ounce boxes of morphine. The evidence introduced does not show that the said Gee Sue Tom unlawfully possessed any narcotic drugs as alleged in the indictment, nor that the said Gee Sue Tom was carrying on any business requiring him to register and pay a tax under the Act of Congress of December 19, 1914, as amended February 24, 1919, as set out in the indictment;

“5. That the evidence does not show the inception and continuance of said conspiracy or that the defendant was a party thereto, or that he knew of said alleged conspiracy, or that he participated therein, or that he committed any overt act as charged in the indictment, or otherwise.

“6. That the evidence does not show that the alleged conspiracy originated with the defendant or that he joined the conspiracy at its inception, but it shows that a suitcase was [30] checked from Oakland, California, to Reno, Nevada, but does not show that it was the result of a confederation or conspiracy between the defendants and there is not sufficient corroboration of the facts introduced by the Government to authorize the conviction of Gee Sue Tom.

“COURT.—Motion is denied: Exception saved.”

V.

The Court erred in overruling and denying the defendants' motion to quash the indictment and direct the jury to return a verdict of not guilty made at the conclusion of the Government's case upon the grounds in said motion taken and assigned, to wit:

1. That said indictment does not charge any offense under the laws of the United States, because the said indictment does not set forth how or in what manner the alleged possession of said narcotics was unlawful, and that no facts are stated showing that the alleged possession was accompanied by such a purpose or intent or under such circumstances as to render it a violation of any law, and the indictment in case No. 11,132 fails to make any allegation whatsoever with reference to the fact that neither of them registered and neither of them paid a tax.

Mr. SAPIRO.—Now I want to call the attention of the Court to one of the records of this Court

and this indictment in Case 11,785 in which the Government has reindicted these men on the identical charge after this indictment was brought, and in that indictment, if the Court please, the specific allegations denying that these two men were merchants or were dealers and had failed to register and pay the tax is set out.

COURT.—That was filed subsequent to this?

Mr. SAPIRO.—Filed subsequent to this indictment.

Mr. FINK.—We are on trial on the last indictment which was returned by the grand jury in this district. [31]

Mr. SAPIRO.—I beg your pardon. There is the indictment we are on trial on; the Court has it in his hand.

Mr. FINK.—That is not the intent. If you will refer to my opening statement you will note that I carefully quoted the language of the last indictment in this case.

Mr. SAPIRO.—And if you will refer to my opening motion you will see that I called the Court's attention to the number of the indictment and the one we are proceeding on. That was the purpose of my motion.

Mr. McGEE.—You may remember we asked the clerk which we were proceeding under and he handed me that indictment which is in your Honor's hands now.

COURT.—Doesn't the record show?

CLERK.—Yes, your Honor, the record shows. I will get the record.



Mr. FINK.—There are two indictments in this case, may it please the Court.

COURT.—I haven't any doubt about either of them, as far as that goes, but would like to see which one you are proceeding under. I will say, Mr. McGee, that since your motion of yesterday, I compared this first indictment with the decisions and am perfectly satisfied with it.

Mr. FINK.—. . . . Investigation discloses the fact that the record shows we are now on trial on indictment #11,132. There are two indictments in the case; the other indictment is 11785. I first desire to direct the attention of the Court to the fact that indictment #11,132 was filed in this Court on May 16, 1922, and that indictment #11,785 was filed upon September 29, 1922. Upon indictment #11,132 all of the preliminaries were completed upon July 6, 1922, and the case was in condition to be set. Upon indictment 11,785 all of the preliminaries were completed upon October [32] 11, 1922, and the case was in condition to be tried. . . . Now, here we have a situation where one indictment #11,132 was returned and another indictment #11,785 was returned to correct what we believed to be an error in the first one, so that we have the identical defendants; we have the identical set of dates; we have the identical charge; and I take it that the only question left, then, is as to whether this court at this time has the right to consolidate. . . .

COURT.—Let me ask you, Mr. Fink, in the first



indictment was there any demurrer interposed to that?

Mr. FINK.—No preliminary motions of any kind, either demurrers, motions to quash, plea in abatement, or any other kind has been interposed to either indictment. So the record shows just the indictments, absolutely nothing else.

COURT.—As I said the other day, gentlemen, I have no doubt whatsoever that the first indictment states facts sufficient to form a conspiracy. It alleges a conspiracy to violate the act of 1914 as amended in 1919 entirely sufficient to call the attention of the defendants to the nature of the charge. Then the district attorney has followed that up with an indictment by the grand jury charging exactly the same offenses in which there is asserted the omission that charges these persons were persons who were required to register and had not done so. The motion to dismiss the first indictment will be denied.

Exception saved.

## VI.

The Court erred in granting the motion of the district attorney that indictments No. 11,132 and 11,785 be consolidated and that the trial be proceeded with over the objection of the defendants.

Mr. FINK.—I therefore renew my motion that these two [33] indictments be consolidated and that we proceed.

Mr. SAPIRO.—To which motion of the district attorney, the defendants object.

The COURT.—The motion to consolidate the two indictments for trial and to proceed will be granted *nunc pro tunc* as at the beginning of this trial. It is true that the exact question has not been presented, but it does not seem to me that this Court is so impotent, where the defect is a mere matter of error of designation of a number, because that is all it amounts to, that it is required to dismiss the charge and go forward under a new indictment. The motion of the district attorney will be granted and we will proceed.

Exception saved by defendant.

## VII.

The Court erred in denying the defendants' motion to direct a verdict of not guilty and quash and abate and overruling defendants' plea in bar upon the ground that jeopardy has attached upon the grounds in said motion taken and assigned, to wit:

Mr. McGEE.—The record now discloses that the motion of the defendants, and each of them, to quash indictment 11,132 and abate the action and to direct the verdict has been overruled as to each of the defendants; that the motion of the district attorney to consolidate indictments 11,132 and 11,785 has been granted by the Court and the Court has entered a *nunc pro tunc* order as of the commencement of the trial with reference to the consolidation. At this time and at this juncture comes the defendant, Gee Sue Tom, and renews the identical motion made with reference to 11,132 *in haec verba*, and upon all the grounds stated,

as to the motion to quash, and to abate and to direct a verdict and further and in addition thereto, enter at this time a plea in bar upon the ground that jeopardy has attached under indictment 11,132, and may we have [34] a ruling upon that?

The COURT.—The motion will be denied and the plea of once in jeopardy will be overruled.

Exception saved.

### VIII.

The Court erred in receiving the testimony offered by the district attorney under indictment 11,785 over objection of defendants and erred in denying defendants' motion that the same be stricken from the record and that the jury be instructed to disregard it, upon the grounds in said motion taken and assigned, to wit:

Mr. FINK.—May it please the Court, I now make a formal offer of the testimony of Messrs. Kirly, Haley, Ohman, O'Neill, Keyes, Roberts, and McNichols, on both direct and cross-examination as heretofore given, commencing upon March 22d and continuing through March 23d; the testimony of Mr. Stribling, also, that was stipulated, however. That testimony is offered as applying to indictment 11,785 as well as to 11,132. (Defendants had previously stipulated that the testimony if offered would be identical with that heretofore given by the same witnesses, preserving all of their rights, except the constitutional right to be confronted with the witnesses who would testify against them.)

Mr. McGEE.—That goes as to all the motions and rulings of the Court.

Mr. FINK.—Yes, and exhibits also.

Mr. McGEE.—I understand the district attorney includes in that offer all the objections, exceptions, and rulings of the Court.

COURT.—All proceedings whatsoever.

Mr. McGEE.—Now, at this time, comes the defendant Gee Sue Tom and objects to the reception of any testimony on all the grounds [35] heretofore stated incorporated in *haec verba*, and the additional ground that it is incompetent, irrelevant, and immaterial, and that the said defendants have heretofore been placed in jeopardy and also move that all of the testimony applicable to the consolidation of the action 11,785 be stricken from the record and that the jury be instructed to disregard it.

Objection overruled, motion denied; exception saved.

## IX.

The Court erred in overruling and denying defendants' motion for a directed verdict of not guilty at the conclusion of all the testimony upon the grounds in said motion taken and assigned, to wit:

Mr. McGEE.—At this time, briefly, by reference merely, we renew in *haec verba* and upon all the grounds and points the motions made to quash, abate, and at this time ask the Court to direct the jury to return a verdict for defendant Gee Sue Tom.

COURT.—Motion denied; exception saved.



## X.

The Court erred in giving the following instruction over the objection of counsel for defendant, to which exception was duly taken:

“In this case there are two indictments. These indictments, however, charge but a single offense, and upon them you can render but a single verdict of either guilty or not guilty. That is to say, you are for the purposes of your verdict to consider the second indictment as a mere amendment or correction of the first.”

## XI.

The Court erred in giving the following instruction to the jury over the objections of counsel for defendant, to which exception was duly taken:  
[36]

“In this connection I instruct you that if you find that either of the defendants had in his possession a baggage check entitling him or them to the possession of a suitcase containing any of these drugs, then the possession of such check with knowledge of the contents of the suitcase and intent to procure the suitcase is, in law, the possession of the drug. But these defendants are not charged with having the drugs in their possession. They are charged with a conspiracy so to do.”

## XII.

The Court erred in giving the following instruction to the jury over the objections of counsel for defendants, to which exception was duly taken:



“You are instructed in the first place that under the Act of Congress mentioned in this indictment it is a crime to have in possession opium, morphine, or cocaine, unless the person so having in possession has registered and paid the prescribed tax. There is no claim or pretense here that either of these defendants has registered or paid the tax and, therefore, the possession of these drugs by either of them would constitute a crime against the United States. It is not necessary for the Government to show failure to register or pay the tax if it shows possession.”

### XIII.

The Court erred in overruling defendants' motion in arrest of judgment upon the grounds in said motion taken and assigned, to wit:

1. Because the bill of indictment in this cause is insufficient to support any judgment against him, in this: the indictment contains but one count, and by such indictment it is sought to charge him and the other defendant with an unlawful conspiracy to violate a law of the United States, in that the purpose or object of the conspiracy is not set out with sufficient or proper clearness or certainty. The indictment charges that the said defendants [37] did knowingly, unlawfully, wilfully, and feloniously conspire, combine, confederate and agree together, with, between and among ourselves, and with divers other persons to the grand jurors aforesaid unknown, to unlawfully, wilfully and feloniously have in their possession certain narcotic

drugs, etc., and does not further describe, declare or set out the object or purpose of the conspiracy. The ownership of such goods is not alleged; no facts are alleged from which it can be determined by an inspection of the indictment how or in which manner the alleged possession was unlawful, and all the allegations are mere conclusions of law and are consistent with lawful and rightful possession.

2. Because no facts are alleged in the said indictment from which it can be determined by an inspection of the indictment that the overt acts charged to have been committed by the defendants Hon Won Chong and Gee Sue Tom, or either of them, were committed in pursuance of or to effect the object of the alleged conspiracy. In other words, no facts are alleged in the said indictment from which it is made to appear from an inspection of the said indictment from which it can be determined that the purpose or object of the alleged conspiracy was to possess certain narcotics unlawfully and feloniously; that the said indictment is vague, uncertain, indefinite, and insufficient, in that the same does not sufficiently aver or state the elements of the alleged crime or offense charged therein, nor the ingredients of which said alleged crime or offense is composed; that no unlawful means, or any means are set out in said indictment used by said defendants or either of them in carrying out the alleged conspiracy or combination.

3. That neither said indictment nor any part thereof, alleged any fact or facts showing that the defendants or either of them was a party to any

unlawful contract, conspiracy, or combination to violate the Act of Congress of December 17th, 1914, as [38] amendment February 24th, 1919, or any other law of the United States. That the allegations charging said defendants and each of them, in said indictment, and in each and every part thereof, with a conspiracy, are conclusions of law.

4. Because it does not appear from the allegations of the said indictment with sufficient clearness or certainty, or from the allegations of facts in said indictment that the object or purpose of the alleged conspiracy was to commit an offense against the law of the United States, and that some overt act was committed by one of the alleged conspirators in furtherance of or for the purpose of carrying out the alleged conspiracy.

5. Because on the trial of this cause the evidence was insufficient to show jurisdiction in this Court to hear and determine this cause. That it affirmatively appears from the record and minutes of the Court, that an objection was interposed by the defendants, and each of them, to the introduction of any testimony after the first witness was sworn, on the ground that the indictment did not state facts sufficient to charge a public offense, and motion was made to quash the indictment; that after the Government rested, both of said motions were renewed, and motion was made that the Court direct the jury to return a verdict of not guilty; that the Court on motion of the district attorney, consolidated or substituted an indictment numbered 11,785 with or for the indictment under

which these defendants were being tried; that both of said indictments are now pending and neither has been dismissed; that said action of the Court was unwarranted in law and in violation of the constitutional guaranties of the defendants and each of them; that the defendants have never been apprised, nor are they now, nor can they ascertain which indictment the jury have found a verdict of guilty; that if this Honorable Court ever did have jurisdiction of this cause, the same was lost when the motion [39] to quash and direct the jury to return a verdict of not guilty was interposed by the defendants.

6. That neither the first indictment No. 11,132, or the second indictment No. 11,785, nor the consolidated indictment, do not show the commission of any offense by the defendants or either of them, against any law of the United States, for the reasons heretofore set forth in paragraphs 1, 2, 3, and 4 of this motion.

7. The verdict of the jury is not supported by the evidence in the case.

8. The evidence in the case does not prove, or tend to prove that the said Hon Won Chong and the said Gee Sue Tom, or any or either of them, was a member of the said conspiracy charged in the indictment.

9. The evidence does not prove, or tend to prove, that there ever was a conspiracy or agreement as alleged in the indictment.

10. The evidence in the case does not prove, or tend to prove that the said Hon Won Chong and



Gee Sue Tom, or any or either of them, was guilty of the offense charged in the indictment.

11. The verdict in said case, if supported by any evidence at all, is not sustained by sufficient evidence, and is contrary to the manifest weight of the evidence.

#### XIV.

The Court erred in making, giving, and rendering judgment against the defendants for the reason that said indictment does not state any crime or any offense against any law of the United States, and for the reasons taken and assigned by the defendants in their motion in arrest of judgment.

#### XV.

The Court erred in sentencing the defendants without their being first lawfully adjudged guilty of any crime. [40]

#### XVI.

The Court erred in pronouncing sentence of imprisonment against the said defendants.

Exceptions were duly taken to each and every of the above specified rulings.

WHEREAS, by the law of the land, said judgment ought to be given for said Gee Sue Tom and Hon Won Chong, plaintiffs in error, and against the United States of America, defendant in error, said plaintiffs in error, Gee Sue Tom and Hon Won Chong, do now pray that the judgment herein rendered against them to be reversed and annulled and altogether held for nothing and that the sentence herein imposed upon them to be set aside and held for naught and that they be restored to all



things which they have lost by occasion of the said judgment and that they be afforded such and any and all other relief as may be meet in the premises.

Dated at San Francisco, California, April 28, 1923.

R. L. DAILY,

Attorney for Hon Won Chong.

C. A. A. McGEE and

J. H. SAPIRO,

Attorneys for said Defendant Gee Sue Tom.

Due and legal service of the above and foregoing assignment of errors, and receipt of a copy thereof, is hereby accepted and admitted in the city and county of San Francisco, State of California, this 28th day of April, 1923.

\_\_\_\_\_,  
United States Attorney.

By \_\_\_\_\_.

[Endorsed]: Filed Aug. 9, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.  
[41]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

11,132.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HON WON CHONG, etc., and GEE SUE TOM,  
etc.,

Defendants.

**Order Allowing Writ of Error and Supersedeas.**

Come now Hon Won Chong and Tom Gee Sue, defendants herein, and file herein and present to the Court their petition praying for the allowance of a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to the above-entitled court, and submit herewith the assignment of errors intended to be urged by them; praying also that a transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to said United States Circuit Court of Appeals for the Ninth Circuit, and praying also that meanwhile all further proceedings in the above-entitled District Court be suspended, stayed and superseded, and that sentence and execution herein be stayed until the final disposition of said writ of error in the aforesaid United States Circuit Court of Appeals.

NOW, THEREFORE, in consideration of the premises, and the Court being fully advised, and each of the above-named defendants having heretofore submitted to the above-entitled court his respective bond for appearance in the United States District Court, for the Northern District of California, or in the United States Circuit Court of Appeals for the Ninth Circuit, or in the Supreme Court of the United States of America, as may hereafter in this cause be ordered, in the sums following, to wit: Defendant Hon Won Chong in the sum of Five Thousand Dollars (\$5,000.00), and the [42] defendant Gee Sue Tom in the sum of Five Thousand Dollars (\$5,000) (said sums being the amount of bail heretofore fixed by this Court for each of said defendants respectively, and said bonds, and each of them, having been heretofore accepted and approved by this Court):

IT IS HEREBY ORDERED that the said petition and the aforesaid writ of error be, and the same is hereby allowed; and,

IT IS FURTHER ORDERED that a transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to the aforesaid United States Circuit Court of Appeals for the Ninth Circuit; and,

IT IS FURTHER ORDERED that all further proceedings in this above-entitled District Court be suspended, stayed and superseded until the final disposition of said writ of error in the aforesaid United States Circuit Court of Appeals, for the Ninth Circuit; and,

IT IS FURTHER ORDERED that sentence and execution herein be stayed until the final disposition of said writ of error in the aforesaid United States Circuit Court of Appeals for the Ninth Circuit; and,

IT IS FURTHER ORDERED that the bond for costs upon the writ of error herein be, and it is hereby fixed at the sum of Five Hundred (\$500.00) Dollars, said bond to be entered into jointly by the two defendants hereinabove named.

Dated: San Francisco, California, August 9th, 1923.

JOHN S. PARTRIDGE,  
Judge of the United States District Court for the  
Northern District of California, First Division.

Due and legal service of the above and foregoing order allowing writ of error and supersedeas and receipt of a copy thereof, is hereby accepted and admitted in the city and county of San Francisco, State of California, this —— day of May, 1923.

\_\_\_\_\_,  
United States Attorney.

[Endorsed]: Filed Aug. 9, 1923. Walter B. Mal-  
ing, Clerk. By C. M. Taylor, Deputy Clerk. [43]

In the Southern Division of the United States  
District Court for the Northern District of  
California, First Division.

Nos. 11,132 and 11,785.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HON WON CHONG, *alias* F. T. HENRY, and  
GEE SUE TOM, *alias* GEE TOY,

Defendants.

**Bill of Exceptions on Behalf of Gee Sue Tom and  
Hon Won Chong.**

BE IT REMEMBERED that heretofore the Grand Jury of the United States in and for the Northern District of California, First Division, did find and return in, to and before the above-entitled court its two several indictments against the defendants Hon Won Chong and Gee Sue Tom, numbered 11,132 and 11,785, and thereafter the said Hon Won Chong and Gee Sue Tom appeared in Court, and upon being called to plead to said indictments, entered their pleas of not guilty; and

BE IT FURTHER REMEMBERED, that the said defendants, having duly pleaded not guilty, as shown by the record herein, and the cause being at issue, case No. 11,132 came on for trial before the Honorable John S. Partridge, District Judge of said court, and a jury duly empanelled, the United States being represented by John T.



Williams, Esq., United States Attorney, Grove J. Fink, Esq., Assistant United States Attorney, and Miss Alma M. Myers, Assistant United States Attorney, and the defendant Gee Sue Tom being represented by C. A. A. McGee and J. H. Sapiro, and the defendant, Hon Won Chong by Roy L. Daily, Esq., and the following proceedings were had:

Grove J. Fink, Esq., Assistant United States Attorney, made an opening statement of the case to the jury, [44] as follows: "The case, as you have been advised is the United States vs. Hong Wong Chong and Gee Sue Tom. The indictment is returned under Section 37 of the Criminal Code of the United States. That section defines the crime of conspiracy as separate and distinct from any other crime. The indictment which we have here before us and upon which we are about to go to trial alleges that the defendants, conspired, combined, confederated together to violate certain requirements of an act or law of the United States, namely the act of December 17, 1914, as amended, the Act which is commonly known and called the Harrison Narcotic Act. The indictment alleges specifically that the combination, confederation or agreement was on or about May 1, 1922; that these defendants were implicated and were the parties so conspiring, that the object of the conspiracy was to have in their possession certain narcotic drugs, to wit, smoking opium and morphine, the defendants then and there being persons required to register and pay a tax under

the terms of the Harrison Narcotic Act, and not having registered or paid the tax as required by law.

It is alleged that the conspiracy or combination has been or was in effect from May 1st 1922, at all times up to and including the date of the filing of the indictment, and inasmuch as Section 37 required the stating in the indictment of an overt act, or an act done in furtherance of the conspiracy, it is alleged that in furtherance of the conspiracy on or about May 1st, 1922, at San Francisco, in the Southern District, etc., these defendants did unlawfully, wilfully and feloniously have in their possession a certain derivative of coca leaves, namely eight ounces of cocaine, and a certain preparation and derivative of opium, namely ten five-tael cans of smoking opium and five boxes of morphine of one ounce each, and that the defendants at the time of so having possession of the drugs there named were persons [45] required to register and pay a tax under the terms of the Act, and that neither had registered nor paid the tax.

In support of the indictment we will show you that in Reno in the State of Nevada, on or about May 3d, 1922, one of these defendants was arrested. We will show you that there came to him checked on a regular ticket of the Western Pacific Railroad Company, I believe, a regular passenger ticket, one suitcase; that the suitcase contained drugs as listed in the indictment. That the defendant in San Francisco—and, gentlemen, I must say that I am a little bit confused myself as to which is which,

they being Chinese names; Gee Sue Tom is the man in Reno, and Hong Wong Chong is the man in San Francisco. At any event we will show you that the man in San Francisco was arrested, and that there was found upon his person a Western Pacific passenger ticket, the baggage portion of which had been used, and it was checked showing use of the baggage ticket, and we will show you that the number on which the baggage left San Francisco corresponded with the number of the suitcase found in Reno, Nevada.

We expect, Gentlemen, to show you that the San Francisco end of the conspiracy, namely Gee Sue Tom, answered to the name of F. T. Henry, the name of the persons sending the material to the Reno defendant Hong Wong Chong.

And, Gentlemen, after supporting each and every one of the material allegations of the indictment, we will ask you for a verdict of guilty, as charged.” [46] The plaintiff to maintain the issues, on its part to be maintained, introduced and offered in evidence the following testimony, to wit:

**Testimony of J. M. Kirkley, for the Government.**

J. M. KIRKLEY, produced as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

(Questions by Mr. FINK.)

Q. Mr. Kirkley, what is your occupation?

Mr. SAPIRO.—Just a moment. Comes now the defendant, Gee Sue Tom, and objects to the introduction of any testimony under the indictment on the ground that the same does not state facts suffi-



cient to charge a public offense. And further moves the Court to quash the indictment at this time because the indictment does not charge any offense under the laws of the United States and because the said indictment does not set forth how or in what manner the alleged possession of narcotics was unlawful, and furthermore that the indictment does not state facts showing that the alleged possession was accompanied by such a purpose or intent or under such circumstances as to render it a violation of any law. The facts averred are consistent with the alleged possession of narcotics being a legally permitted one.

Calling your Honor's attention particularly to this indictment, the fact that the Harrison Narcotic Act is an act for revenue purposes only and permits of a legal possession and ownership of narcotics. Now, this indictment returned in 11132 which we are now trying simply alleges on the first page as follows:

"The said defendants did at the time and place aforesaid, knowingly, unlawfully, wilfully and feloniously conspire, combine, confederate and agree together with, between and among themselves and with diverse other persons to the grand jurors aforesaid unknown, to unlawfully, wilfully and feloniously possess certain narcotic drugs, towit: smoking opium, cocaine and morphine, [47] which said narcotic drugs did not then and there bear and have affixed appropriate tax-paid stamps as required by the aforesaid act of Congress."

Now, the provision of the law is that certain people may have these narcotics, but must pay a tax

(Testimony of J. M. Kirkley.)

and the failure to negative that provision of law in the indictment leaves the broad presumption that the possession is legal and it is a fatal defect in this indictment not to have that averment in and in support of that proposition, I cite to your Honor *Hilt vs. U. S.*, 279 Fed. 421, directly in point, holding an indictment was faulty under these circumstances.

COURT.—Motion denied, objection overruled.

Mr. DAILY.—If your Honor please, on behalf of defendant Hon Won Chong, I desire to incorporate the same motion and one additional, that when a statute quotes an exception the exception must be affirmatively pleaded. That not being so in this case, we ask that the motion be granted.

COURT.—Motion denied.

Mr. DAILY.—Exception saved. All the way through may the exceptions for both defendants be considered as one?

COURT.—Yes.

Mr. McGEE.—The stipulation may stand that when the objection is made and exception follows it, it shall be for both defendants?

COURT.—The record shows an exception in this case.

#### Direct Examination.

I live in Reno, Washoe County, Nevada. I have been chief of police there for four years, and have known defendant Gee Sue Tom for five or six years. I first saw special delivery letter on my desk in Reno and made an endorsement thereon.



(Testimony of J. M. Kirkley.)

I opened the letter and returned it to the Postoffice and reported the matter to Narcotic Agent Haley on May 3, 1922. About half an [48] hour later I accompanied Mr. Haley to the home of Gee Sue Tom. Mr. Haley had a search-warrant. I have known Gee Sue Tom by the name of Gee Toy. We went to his house to pick him up. The letter was here introduced in evidence and marked Government Exhibit 1. I did not see letter, Government's Exhibit 1, delivered to Gee Sue Tom or Gee Toy. I took it away from him and opened it and took out a baggage check and key and went over to the Western Pacific Depot and got his suitcase; this occurred at Reno, Nevada. Prior to going over to the Western Pacific Depot I placed Gee Sue Tom, *alias* Gee Toy, under arrest. Did not open suitcase until returned to police station. I got the key to open the suitcase in the letter in a little package therein. I identify Gee Toy as the big fellow and I got a suitcase with that baggage check. I can identify the suitcase by the contents, and those are the contents we took from the suitcase, the baggage check I presented at the Western Pacific Station calls for a suitcase; I got the check out of the letter on the person of Gee Toy.

On cross-examination the witness testified as follows:

By Mr. McGEE.—When I received that letter I was in my office. I was not present when the letter was delivered to Mr. Gee Toy. He had the letter in his hands when I took it. I do not think he had

(Testimony of J. M. Kirkley.)

ever seen the letter prior to the time I opened it. The post boy left the letter in my office. I delivered the letter to the postmaster himself at the postoffice. When next I saw it was in the hands of Gee Toy at his place of business, the store. He lives there also. The name of the store is Chew Kee Company and proprietor is Gee Fox Song, a brother of Gee Toy. The only proprietor I know of that [49] store was Gee Fox Song. He may have had some other name for all I know. We arrived at the store between half past eleven and twelve o'clock on May 3d and there were present besides myself and Gee Sue Tom, Narcotic Agent Haley, Special Indian Agent O'Neill and the special delivery boy. I did not see the delivery of the letter. I came in afterwards. Gee Sue Tom was holding it in his hand. I don't think he ever had opened it or went into it. I don't remember whether the check fell out on the floor or not. It was opened before it came into his hands. There are quite a number of Chinamen staying at this store. Tom Gee Sue lives in a little building probably a step from the store. I never knew Tom Gee Sue to work at engines until this summer. Do not know of him doing carpenter work or waiting on a restaurant. Saw Gee Sue Tom sometimes every day, maybe a week I wouldn't see him. He was around the store most of the time. I cannot remember him working in a laundry. I personally got the suitcase that has been marked for identification on the strength of the check at the depot.

(Testimony of J. M. Kirkley.)

Signed no receipt for it. No objection made to my getting suitcase.

By Mr. DAILY.—Postmark on the envelope shows Stockton and Reno. No San Francisco postmark on it. I am unable to say whether or not Gee Toy ever opened this envelope. This store is general merchandise and Chinese. His brother is the owner, and I do not know whether he was working there.

By Mr. McGEE.—The defendant was known as Gee Toy to the police department. I went down to Gee Sue Tom's place with the Narcotic Agent to get the Chinaman when he got his letter. The boy got there with the letter before I did.

Redirect by Mr. FINK.

I identify Gee Toy as the one standing up. I also knew him at one time under the name of Ah Tom, also Gee Toy, also Gee Sue Tom. [50]

Mr. FINK.—I desire at this time to read into the record the face of the envelope, Government's Exhibit 1 in evidence. In the upper left-hand corner appears "From F. T. Henry, 1040 Stockton St., S. F., Cal."; in the upper right-hand corner one special delivery United States postage stamp and one United States two cent postage stamp. Address "Gee Toy, c/o Chow Kee, 129 First St., Reno, Nev." Postmarked "Stockton, May 2, 9:30 A. M., Calif." Also on the left two rows of Chinese characters, which counsel cannot read and a rubber stamp in the lower left-hand corner "Fee claimed by office of first address." Sealed with a

(Testimony of H. Haley.)

sticker "Post Office Department, United States of America. Officially sealed." On the reverse side, bearing the postmark "Reno, Nev., May 3, 7 A. M., 1922. Rec'd." Also bearing the mark in lead pencil on the address side "Not Box 44. Opened by mistake."

From F. T. Henry	Special	Two
1040 Stockton St.	Delivery	Cent
S. F., Cal.	Stamp	Stamp
(Chinese Characters)	GEE TOY	Stamp
		Stockton
Fee claimed by office	c/o Chow Kee	May 2
of first address.		920 AM
	129 First St.	Calif.
	Reno, Nev.	

Reverse side:

	Stamp
	Reno, Nev.
	May 3
Sealed with official	7 AM
sticker	1922
	Rec'd

[51]

### Testimony of H. Haley, for the Government.

H. HALEY, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FINK.)

I am narcotic inspector for the Internal Revenue



(Testimony of H. Haley.)

Department and have been such since May, 1919. I was assigned as such at Reno, Nevada, on May 2d and 3d, 1922. I know the defendant Gee Sue Tom, *alias* Gee Toy, and also J. M. Kirkley. On May 3d, 1922, I saw Gee Sue Tom at the store that he stays in; I went there with a search-warrant. Postmaster of Reno showed me a letter that had been opened by mistake, Government's Exhibit 1, and he put an official seal on the letter and gave it to special delivery boy for delivery. I secured a search-warrant from the United States Commissioner for the letter and asked Chief Kirkley and Officer O'Neill to go with me. The boy took the letter to go to deliver it and we followed the boy to the place, 129 Front St. The boy went inside with the letter and we were just a few feet from him. He was inside probably one-half a minute, stepped right out and we followed him in. I showed my search-warrant and Mr. Kirkley took the letter Govt. Exhibit #1 from the Chinaman, Gee Sue Tom. I opened the letter and took the baggage check and secured another search-warrant for the suitcase that the check called for and went to the Western Pacific Depot at Reno and got the suitcase. I identify that suitcase and contents Govt. Exhibit #2 for identification, which I procured on check #409250, which I identify as Govt. Exhibit #3. Number of ticket on suitcase was 409250. Gee Sue Tom was arrested at the time letter was taken from him.

I was in San Francisco on May 9th, 1922, and prepared a registered letter addressed to F. T.



(Testimony of H. Haley.)

Henry at 1040 Stockton Street and caused that letter to be delivered there by Agent Keyes of our department. Cancellation stamps and postmarks were put on at the Ferry Postoffice and the letter was sent [52] and went through as a regular letter. I was in the vicinity of 1040 Stockton Street in this city, county and State, on the 9th of May. Went into Apartment No. 38 of the place. The defendant Hon Won Chong had been arrested by Mr. Keyes, and assisted Mr. Halstead and Mr. Keyes in searching the pockets of Hon Won Chong, the defendant, and also in searching the room. They took a bunch of papers from his pocket and I found this ticket in the papers. The defendant had been previously placed under arrest. The narcotics in the suitcase are in the same condition that they were at the time they were found save and except for a sample being taken from them. This is a slip that was signed by the party who checked the baggage in the Oakland Depot May 1, 1922, and bears number 409250 and thereupon at the request of Mr. Fink the above-mentioned registered letter was marked Govt. Ex. 4 for identification and the above-mentioned railroad ticket was marked Govt. Ex. 5 for identification and the above-mentioned Western Pacific Railroad baggage slip was marked Govt. Ex. 6 for identification and the above-mentioned slip of blank paper bearing pencil mark was marked Govt. Ex. 7 for identification and the witness identified the same.

(Testimony of H. Haley.)

Cross-examination.

(By Mr. SAPIRO.)

I first saw letter marked Government's Exhibit No. 1 about 11 o'clock on May 3d at the postoffice in Reno. At that time a sticker was put over the top. Mr. Ohman, special delivery messenger, took the letter to 129 Front Street. We walked about fifty feet behind him but in sight of him all the time. The defendant did not have time to open the letter by the time we got in there and did not open it. Defendant was standing just a few feet inside the front. He had the letter in his hand. I told him I had a search-warrant for him and he didn't say anything at all. Mr. Kirkley took the letter from him; we informed him he was under arrest. Mr. Kirkley went immediately to the [53] depot with the baggage check; the defendant was left with Mr. O'Neill. This yellow slip, Government's Exhibit 6 is the original on file in the Oakland office. They usually mark it in the book also. I have been in Nevada about eighteen months prior to May 3, 1922.

(By Mr. DAILY.)

The part written on this envelope in English is in my handwriting. Chu Kee Company is the name of a store in Reno. Mr. Keyes delivered the letter. I was waiting outside in the street. Apartment 38 was either on the second or third floor. I did not see Hon Won Chong with this letter. Mr. Keyes had already taken it from his possession when I got in. He had already arrested Hon Won Chong. I gave it to Keyes for delivery. [54]

(Testimony of H. Haley.)

I first saw this railroad ticket when it was taken from among some papers in Hon Won Chong's pocket when he was standing in his room at 1040 Stockton Street in the presence of Mr. Keyes, Mr. Halstead, Mr. Roberts, and myself. I searched room 38 and Hon Won Chong and found no narcotics. When I first saw Government's Exhibit 1 it had already been opened. There is no other valuation certificate that I know of other than the twenty-five dollars. I never instructed anyone to change any record of valuation.

(By Mr. SAPIRO.)

I found no narcotics either on the person of Gee Sue Tom on May 3d or at any other time; neither did I find any on the premises, 129 Front Street, Reno. Neither I nor anyone else made any search of the premises.

(By Mr. FINK.)

I found narcotics in the suitcase I got from the Western Pacific Depot. The English writing on Government's Exhibit #4 for identification was written by myself; the Chinese characters were written by a Chinaman and I asked him to address it to Soo Hoo Yee Way in Chinese.

(By Mr. DAILY.)

None of these Chinese characters addressed to F. T. Henry, and the name of Hon Won Chong does not appear on there at my direction.

**Testimony of John Ohman, for the Government.**

JOHN OHMAN, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. FINK.

I have lived in Reno, Nevada, a little over twelve years. Am working for the Postoffice Department delivering special delivery letters. I know the defendant Gee Sue Tom by the other name of Gee Toy. I would say that before May 3d, 1922, I delivered six or seven special delivery letters to him. [55]

Q. And can you now fix the date of delivery of a special delivery letter to this defendant prior—the last one prior to May 3d, 1922?

Mr. McGEE.—Objected to as incompetent, irrelevant and immaterial.

A. No, I cannot.

COURT.—What is the point, Mr. McGee?

Mr. McGEE.—Why, it has no bearing upon the matter charged in the indictment, conspiracy. Suppose he has received a dozen special delivery letters. What bearing would it have upon this unless the letter itself was introduced in evidence and connects this defendant with the alleged coconspirator?

COURT.—That would be a matter of weight of the evidence. Evidence of similar transactions in a conspiracy trial is always admissible. Objection overruled; exception saved.

Q. What was your answer?



(Testimony of John Ohman.)

A. I would say about—either the last of April or the first of May, I am not sure which. In the month of May, 1922, the postoffice regulations did not require any receipts for special delivery letters. I remember Government's Exhibit 1 as a special delivery letter that I delivered to Gee Toy on May 3d. I got the letter from the postoffice and this official seal was placed upon it after I had taken it to the station. I delivered it personally to Gee Toy about ten o'clock May 3d, 1922.

Cross-examination.

(By Mr. McGEE.)

I have been in charge of the special delivery department at Reno since the last of April, 1922. In our department we keep a record of every special delivery letter that comes in. I have not that record with me; it is at Reno. When I first received letter marked Government's Exhibit 1, I took it to the police station under instructions from the postoffice inspector. I left it with a patrolman who was acting desk sergeant about half past eight on the morning of May 3d. It was then unopened. Postmaster put the sticker across the top after [56] it had been opened. This envelope is in identically the same condition that it was in when I took it over to the station with the exception of the sticker and the mark of the clerk here in court. It came into my hands again about half past ten from Mr. Haley. My instructions were to deliver it to Gee Toy. The letter is addressed to 129 East First Street, and I delivered it to 129 East Front



(Testimony of John Ohman.)

Street. I did not deliver it to the place where it was addressed. There is no such street in Reno. I happened to know that was his place of business and that was the name that he was going by. That is Gee Toy standing up. He has been running a store there for quite a while and seemed to be the only one there. The Chu Kee Company is the name of the store. I believe his brother is the owner but I have never seen him. I believe his brother's name is Gee Fook Sang. I don't know for certain that that was his place of business, only that I have seen him there considerably; he has been the only one there when I was there. I have heard that his brother is the owner from the Chief of Police. I went to work in charge of the special delivery department somewhere around the last of April, 1922. I might have worked seven or eight days before May 3d, 1922, and six or seven of these letters could have come to him in that time. I am not sure whether one came every day or every other day. When I delivered the letter I asked him if his name was Gee Toy and he said yes. I told him that the letter had been opened by mistake and that the postmaster had sealed it up and then I handed it to him and walked out. I did not see him open it. The officers came in just as I went out. There was no one in the store besides myself and Gee Toy.

Redirect Examination.

(By Mr. FINK.)

Front Street in Reno is a street that runs east from Virginia Street, and First Street is a street

(Testimony of John Ohman.)

that runs off of Riverside Drive. First Street is mostly residences and Front Street is office buildings and the lower part of it is Chinatown. [57] I couldn't say exactly when I went to work regularly in the postoffice but it was some time after April 15, 1922. Before that I worked on and off as a helper and few things like that. The person to whom I [58] delivered the letter at the chief's office was the person then in charge of the office.

Recross.

(By Mr. McGEE.)

Q. Have you any particular knowledge, Mr. Ohman, of the outside superscription and what appeared upon the envelopes of the other letters that you say were delivered to this defendant?

A. Some of them were addressed to the Chu Kee Company, some of them to Gee Toy at Chu Kee Company—

Q. But this is the only one that was addressed to First Street and to Gee Toy?

A. Not the first one that was addressed to Gee Toy, no.

Q. You know were addressed to Gee Toy? Now, you have said that several of them were addressed to other people?

A. Well, several of them were—some of them were addressed to just Gee Toy and some of them were addressed to Gee Toy at Chu Kee Company.

Q. Can you testify as to the character of the handwriting on these envelopes? Were they all in the same handwriting?

(Testimony of John Ohman.)

A. I don't know. I didn't look at them close enough to know whether they are or not.

Q. You wouldn't say, then, would you? A. No.

Q. Didn't you notice whether there was any return address or not? A. No.

Mr. McGEE.—Now, your Honor, at this time we move that the testimony of this witness given in chief and on his cross-examination with reference to other special delivery letters be stricken from the record and all testimony relative to it be stricken from the record, and the jury instructed to disregard it for the reason that it develops that there is a record at Reno, in the postoffice, showing the time, place, and whom the letters were addressed, and is the best [59] evidence and is the only evidence that will enable us to adequately protect the interests of the defendant, and for the further reason that it now appears that some of these letters which he now testifies were addressed to other persons or concerns and there is no evidence that it was in the same handwriting as the address on Government's Exhibit 1 alleged to have been delivered on May 3d.

COURT.—As to the first part, the best evidence rule applies only when it is sought to show the contents of writing. The testimony of the witness was as to the physical fact. And the second point, it is for the jury to draw any proper inference they may see fit from the delivery of letters to the same place.

**Testimony of G. W. O'Neill, for the Government.**

G. W. O'NEILL, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

(Questions by Mr. FINK.)

I reside at Reno, Nevada; have lived there for about nine years; am a special officer, U. S. Indian Service for the suppression of liquor and drugs among the Indians. I was in Reno on May 3d, 1922, and saw the defendant Gee Sue Tom, *alias* Gee Toy, on that day at Chu Kee's store. I am confused as to whether it is Front Street or First Street, but it is in the Chinese part of town. At the request of Mr. Haley I accompanied him and Chief of Police Kirkley there. I identify Gee Toy as the same person we call here Gee Sue Tom, who I found at the store. I knew him as Gee Toy before I went there. Mr. Haley and the Chief of Police went into the front and I went to the rear and when I came in the front Mr. Kirkley was taking the letter, Government's Exhibit #1, out of this defendant's hands. I took him to the City Hall and booked him and he gave the name of Gee Toy. He was asked if his name wasn't Ah Tom and he said no. I scratched my initials on the material in the suitcase for identification, also on the envelope. [60]

Cross-examination.

(Questions by Mr. SAPIRO.)

This occurred between eleven and twelve in the morning. I met Mr. Haley at the City Hall to-



(Testimony of G. W. O'Neill.)

gether with the chief of police. They instructed Ohman to deliver this letter. He was told that we would follow him down there and we did. The other two officers went in first and I went to the rear. When I came in front Ohman had come out and Kirkley and Haley were inside. When I came in Kirkley was taking the letter out of the hand of defendant. Only a minute elapsed from the time I went to the rear until I came in the front of the store. The chief of police took the letter from the defendant. I don't know whether the letter was opened in the store and the baggage check taken out in my presence. There was no conversation about the baggage check in the store. I did not see the baggage check in the store. I have only known the defendant Gee Sue Tom to see and didn't know what his name really was until that time. I knew him as Gee Toy. I knew he was at Chu Kee's store. I knew his brother. They call him his brother. I had no business dealings with him. Never had any conversation with him prior to the 3d of May, 1922. When I took him to the station someone asked him if his name was Ah Tom and he denied it. Said his name was Gee Toy. Previous to the 3d of May, 1922, I didn't know under what name he went. He didn't tell me his name was Gee Sue Tom. I did not ask to see his certificate of identity.



**Testimony of F. D. Stribling, for the Government.**

F. D. STRIBLING, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

It was stipulated that if the witness would testify he would testify that the contents of the suitcase is cocaine, morphine, and opium. [61]

**Testimony of H. S. Keyes, for the Government.**

H. S. KEYES, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FINK.)

I live in Oakland and was formerly connected with the Internal Revenue Service and was in the service on May 9th, 1922. On that day I saw the defendant, Hon Won Chong, at Room 38, #1040 Stockton Street, San Francisco, about one o'clock in the afternoon. In the morning in company with Mr. Haley I made arrangements to get a special delivery letter and a mail carrier's uniform to deliver a special delivery letter to F. T. Henry, room 38, 1040 Stockton St., this city and county. I got the letter and the uniform about 10 o'clock. Government's Exhibit 4 for identification was the letter that was given to me to deliver to F. T. Henry at 1040 Stockton Street. I went there on May 9th and on my first visit did not find F. T. Henry there. I returned at one o'clock and went

(Testimony of H. S. Keyes.)

up to room 38 and a man who identified himself as F. T. Henry met me at the door. I asked him if he was F. T. Henry and he told me yes. I told him I had a registered letter for him. I identify the man who said he was F. T. Henry who is here known as Hon Won Chong and is sitting in the courtroom. Defendant Hon Won Chong signed the receipt in my presence.

At this point Government's Exhibit 4, being the registered letter, was introduced in evidence and received, and the registry return card was introduced in evidence and marked Government's Exhibit #8.

After the signature to the registry receipt I delivered the letter to defendant. He started to close the door and open the letter and I placed him under arrest and called for men outside and we searched room 38. We found Western Pacific Railroad ticket, Government's #5 for identification, among the papers in his pocket. [62]

At this point Government's Exhibit 5 for identification was introduced in evidence and given the same number, being Western Pacific ticket #182,646, showing passage from Oakland to Reno.

Cross-examination.

(By Mr. DAILY.)

Hon Won Chong spoke to me in English. I first saw defendant standing in the doorway of room 38. I handed him the letter after he signed the receipt. I asked him if his name was F. T. Henry. He

(Testimony of H. S. Keyes.)

said, "Yes." I said, "You sure? You have to sign for this." He said, "Yes." I said, "All right, you sign right there." He signed the card, F. T. Henry, and handed it back to me. I then handed him the letter. He did not say, "F. T. Henry is not here." He did not sign the word Henry first and hand it back to me nor did I say to him, and say, "You sign, F. T." He never attempted to open the letter in my presence. Room 38 is on the 3d floor, north side of the building. This is an apartment building occupied by numerous Chinese. The first time I went there a woman answered the door. She said she was F. T. Henry's wife.

### **Testimony of A. W. Roberts, for the Government.**

A. W. ROBERTS, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

#### **Direct Examination.**

(By Mr. FINK.)

I am narcotic inspector, Internal Revenue Service, and was in the service on May 9, 1922, at San Francisco. On that day I went to 1040 Stockton St. with Mr. Haley, Mr. Keyes and one or two officers. Mr. Keyes was dressed in a mail carrier's uniform. On our second visit at about one o'clock Mr. Keyes went in first and then gave us a signal and we went to Room 38 and Keyes had the defendant Hon Won Chong in custody. I saw Mr. Haley and Mr. Keyes find the ticket, Government's

(Testimony of A. W. Roberts.)

Exhibit 5, among the papers taken from the defendant's pocket. Mr. Haley put a memorandum on it. [63]

Cross-examination.

(By Mr. DAILY.)

We did not find anything else on this defendant or which came from him bearing the name F. T. Henry. The papers were mostly Chinese memoranda.

At this point Government's Exhibit #2 for identification, being the suitcase and its contents, was introduced in evidence and given the same number.

### **Testimony of J. H. McNichols, for the Government.**

Direct Examination.

(Questions by Mr. FINK.)

I live in Oakland; am railroad baggage agent for the Western Pacific at Oakland and have been such since December 4th, 1921, at that station, and was such on May 1st, 2d, and 3d, 1922. Government's Exhibit 6 for identification is a valuation slip which we require on all shipments on baggage checks. We have the passenger present the ticket. We have the baggage check on it and we have this slip placed out in front of him to sign his name, address, and the value. This he does his own self. We take it and place the baggage check that says the number of it on the slip that we attach to the baggage. This is the original record of the Western Pacific Railroad Company. I delivered it to



(Testimony of J. H. McNichols.)

Mr. Haley. When the baggage is checked upon a ticket, we have a punch to cancel the baggage privilege. On May 1st we had a baggage punch that punched "B. C." Government's Exhibit 5 has been used for checking baggage. Government's Exhibit 7 for identification is a similar punch mark to the one we used. I gave it to Mr. Haley. He had the ticket and we tried that to see if it was the same, compared them,

At this point Government's Exhibit 6 for identification, the valuation slip of Western Pacific Railroad, was introduced in evidence and given the same number. [64]

One man brought the suitcase in and had a party with him. They were both Chinamen.

At this point Government's Exhibit 3 for identification, the same being Tag 409250 upon the suitcase, was introduced and given the same number.

#### Cross-examination.

(Questions by Mr. DAILY.)

There were two Chinese there at the time this baggage was checked. I saw the Chinaman who signed the name to this valuation slip. He was standing right in front of me. I cannot identify him. I cannot say that this defendant Hon Won Chong was he.

Government rests, with permission to bring in further records of the Western Pacific Railway.

Mr. McGEE.—On behalf of defendant Gee Sue Tom, comes now the defendant Gee Sue Tom in



the above matter by his attorneys, C. A. A. McGee and J. H. Sapiro, and at the close of all the testimony in the case moves the Court to direct the jury to find him, the said Gee Sue Tom, not guilty upon the following grounds:

1. That the evidence adduced fails to prove a conspiracy, as charged in the indictment, for which the defendant could be liable in law to be put upon trial, convicted and punished.

2. That the evidence fails to prove that the defendant Gee Sue Tom was at any time connected with the or any conspiracy, if any, as charged in the indictment.

3. That the evidence does not tend to prove that defendant Gee Sue Tom was guilty in the manner and form as charged in the indictment, or at all.

4. That the indictment charges a conspiracy by the defendants to unlawfully possess certain narcotic drugs, to wit: 8 ounces of cocaine, 10 5-tael cans of smoking opium, 5 one-ounce [65] boxes of morphine. The evidence introduced does not show that the said Gee Sue Tom unlawfully possessed any narcotic drugs, as alleged in the indictments, nor that the said Gee Sue Tom was carrying on any business requiring him to register and pay a tax under the Act of Congress of December 19, 1914, as amended February 24, 1919, as set out in the indictment.

5. That the evidence does not show the inception and continuance of said conspiracy or that the defendant was a party thereto, or that he knew

of said alleged conspiracy, or that he participated therein, or that he committed any overt act, as charged in the indictment, or otherwise.

6. That the evidence does not show that the alleged conspiracy originated with the defendant or that he joined the conspiracy at its inception, but it shows that a suitcase was checked from Oakland, California, to Reno, Nevada, but does not show that it was the result of a confederation or conspiracy between the defendants, and there is not sufficient corroboration of the facts introduced by the Government to authorize a conviction of Gee Sue Tom.

I desire to eliminate one paragraph I have read in view of the indictment, which will be covered by another, and that is the paragraph referring to the registration, which is not set out in the indictment.

Mr. DAILY.—I desire to make the same objection as Mr. McGee for defendant Hon Won Chong, and to add that there has been no evidence introduced to show that he ever wrote or mailed the letter sent to Reno, Nevada, and delivered to Toy, or that he ever checked the suitcase, which it is alleged was sent from Oakland. There has been no evidence introduced, whatsoever, to connect the defendant Hon Won Chong with the *corpus delicti* at any time.

COURT.—The motion as to both is denied.

Exception saved. [66]

Mr. McGEE.—At this time, I desire on behalf of both defendants made at the beginning of the trial, presented by Mr. Sapiro upon behalf of the defendant Gee Sue Tom, objecting to the introduction of any testimony under the indictment on the ground that the same does not state facts sufficient to charge a public offense, and further moves the Court to quash the indictment at this time because the indictment does not charge any offense under the laws of the United States, and because the said indictment does not set forth how or in what manner the alleged possession of said narcotics was unlawful. And furthermore that said indictment does not state facts showing that the alleged possession was accompanied by such a purpose or intent or under such circumstances as to render it a violation of any law. The facts averred are consistent with the alleged provision of the Narcotic Act being lawfully permitted. I call your attention to the fact that there are two indictments and we are proceeding under indictment 11,132, and nowhere in this indictment, I have read it very carefully, is it alleged that either of them failed to register or failed to pay the tax nor has the Government in any instance introduced a single witness to prove either Gee Sue Tom or the other defendant has failed to register or pay the tax. The presumption is, your Honor, in this case as in all criminal cases that if either of these defendants were in possession of any narcotics they were legally in possession of the narcotics, and that presump-

tion obtains until it is overcome. Now, the indictment, itself, fails to make any allegation whatsoever with reference to the fact that neither of them registered and neither of them paid the tax, and for that reason we renew the motion made and ask at this time that the indictment be quashed and that the jury be directed to return a verdict acquitting each of the defendants and that they be discharged from the custody of the law. [67]

Mr. SAPIRO.—The Court will remember the opening statement of the district attorney. He said as the chief violation complained of, that these men had not registered and had failed to pay the tax as required by law. I presume your Honor is very familiar with the Harrison Narcotic Act. The Act provides, among other things, that it shall be illegal to have these narcotics unless these people have registered and paid the tax. In other words, there is a provision in the law which permits the possession—mind, there is no sale charged here or illegally prescribing—permits the possession, providing the person has registered.

COURT.—And pays a tax.

Mr. SAPIRO.—And pays a tax. Now, I want to call the attention of the Court to one of the records of this Court, and this indictment; in case 11,785 in which the Government has reindicted these men on the identical charge after this indictment was brought, and in that indictment, if the Court please, the specific allegation denying that these



two men were merchants or were dealers and had failed to register and pay the tax, is set out.

COURT.—That was filed subsequent to this?

Mr. SAPIRO.—Filed subsequent to this indictment.

Mr. FINK.—We are on trial on the last indictment which was returned by the grand jury in this district.

Mr. SAPIRO.—I beg your pardon. There is the indictment we are on trial on; the Court has it in its hand.

Mr. FINK.—That is not the intent. If you will refer to my opening statement, you will note that I carefully quoted the language of the last indictment in this case.

Mr. SAPIRO.—And if you will refer to my opening motion, you will see that I called the Court's attention to the number of the indictment and the one we are proceeding on. That was the purpose of my motion. [68]

Mr. McGEE.—You may remember we asked the clerk which we were proceeding under and he handed me that indictment which is in your Honor's hands now.

COURT.—Doesn't the record show?

CLERK.—Yes, your Honor, the record shows. I will get the record.

Mr. FINK.—There are two indictments in this case, may it please the Court.

COURT.—I haven't any doubt about either of them, as far as that goes, but would like to see which



one you are proceeding under. I will say, Mr. McGee, that since your motion of yesterday, I compared this first indictment with the decisions and am perfectly satisfied with it.

Mr. FINK.— . . . Investigation discloses the fact that the record shows we are now on trial on indictment #11,132. There are two indictments in the case. The other indictment is #11,785. I first desire to direct the attention of the Court to the fact that indictment #11,132 was filed in this Court on May 16, 1922, and that indictment #11,785 was filed upon September 29, 1922. Upon indictment #11,132 all the preliminaries were completed upon July 6, 1922, and the case was in a condition to be set. Upon indictment #11,785, all of the preliminaries were completed upon October 11, 1922, and the case was in condition to be tried . . . Now, here we have a situation where one indictment #11,132 was returned and another indictment #11,785 was returned to correct what we believed to be an error in the first one, so that we have the identical defendants; we have the identical set of dates; we have the identical charge, and I take it that the only question left then, is as to whether this Court at this time has the right to consolidate . . . I therefore at this time move the Court that the motion of defendants' counsel be denied and the two indictments be consolidated for trial—in other words, that #11,132 and #11,785 be consolidated. [69]

COURT.—Let me ask you, Mr. Fink, in the first indictment, was there any demurrer interposed to that?

Mr. FINK.—“No preliminary motions of any kind, either demurrers, motions to quash, plea in abatement, or any other kind has been interposed to either indictment. So the record shows just the indictments, absolutely nothing else. Now, if it please your Honor, may I recite this fact to the Court that at the time I made the opening statement in this case I made that statement from a carbon copy of the corrected indictment, and that statement was fully made from that carbon copy which I have in my folder and the defendants knew and defendants’ counsel knew that I did make my statement from the corrected indictment; in support of that I call your attention to the remarks of Mr. Sapiro on page 76 of the record.”

Counsel thereupon reads from the reporter’s transcript the remarks of Mr. Sapiro last hereinabove set forth, being his argument on the pending motions. Mr. Fink continues: “I cite that and ask its comparison by the argument made by Mr. Sapiro at the time I introduced my first witness, Mr. Kirkley, and found upon page 1 of the record, in which no motion is made or anything, of that kind, and I call your attention that upon statement of counsel for defense himself there can be no confounding of these defendants in their defense in that they admit that these two indictments are identical, and that the charges are identical, and

that the men charged are identical. I therefore renew my motion that these two indictments be consolidated and that we proceed.

Mr. SAPIRO.—To which motion of the district attorney defendants and each of them object. The district attorney has a right to bring whatever charge he sees fit, provided a proper indictment is on file, in the order he sees fit for the trial before the Court, and having elected by setting this case down for trial, if the Court please, he is bound by his own election in bringing this case to trial.

The COURT.—Well, Mr. Sapiro, he did not elect; as a matter of fact the only thing in the record is the clerk's record which [70] contains the number of the first indictment. Mr. Fink when he made his opening statement to the jury stated the contents of the indictment as contained in the last one, and not the first, that is to say, he said he was going to trial upon an indictment which alleged that these were persons who were required under the statute to register, and that they had not done so, so I don't consider it as a case of clear election by the district attorney to proceed under one indictment.

COURT.—As I said the other day, Gentlemen, I have no doubt whatsoever that the first indictment states facts sufficient to charge a conspiracy. It alleged a conspiracy to violate the Act of 1914, as amended in 1919, entirely sufficient to call the attention of the defendants to the nature of the charge. Then the district attorney has followed

that up with an indictment by the grand jury charging exactly the same offenses in which there is asserted the omission that charges these defendants were persons who were required to register and had not done so. The motion to dismiss the first indictment will be denied. The motion to consolidate the two indictments for trial and to proceed will be granted *nunc pro tunc* as of the beginning of this trial. It is true that the exact question has not been presented, but it does not seem to me that this Court is so impotent, where the defect is a mere matter of error of designation of a number, because that is all it amounts to, that it is required to dismiss the charge and go forward under a new indictment. The motion of the district attorney will be granted and we will proceed.

Mr. SAPIRO.—To which the defendants, and each of them, take an exception as to both parts of the Court's ruling; that is as to the dismissal, we take a separate exception, and as to the [71] consolidation we take a separate exception.

COURT.—Exception allowed to both defendants.

Mr. FINK.—Now, the consolidation will require the presentation of evidence upon the second indictment unless the defendants' counsel are now willing to stipulate that all of the testimony introduced in 11,132 shall be considered as testimony also in 11,785. I assure the Court there is not the least variation in the testimony. It is the same thing in both indictments and if defendants' coun-



sel will stipulate that it may be regarded as offered in both, I think we can proceed. . . .

Mr. McGEE.—May it please the Court, leading up to the stipulation and immediately prior to taking it up, I desire at this time to make a new motion. The record now discloses that the motions of the defendants and each of them to quash indictment 11,132 and abate the action and to direct a verdict have been overruled as to each of said defendants; that the motion of the district attorney to consolidate indictments 11,132 and 11,785 has been granted by the Court and the Court has entered a *nunc pro tunc* order as of the commencement of the trial with reference to the consolidation. At this time and at this juncture, comes the defendants Gee Sue Tom and Hon Won Chong and renew the identical (original?) motion made with reference to 11,132 *in haec verba* and upon all the grounds stated as to the motion to quash and to abate and to direct a verdict, and further and in addition thereto enter at this time a plea in bar upon the ground that jeopardy has attached under indictment 11,132, and may we have a ruling upon that.

COURT.—The motion will be denied, and the plea of once in jeopardy will be overruled. Exception saved.

Mr. McGEE.—Then, your Honor, I would make this offer without prejudice and reserving at all times our legal rights as to each and both defendants that if the district attorney is to [73] pro-



ceed under the order of consolidation and is to introduce evidence, as he says, by the same identical witnesses, the same identical testimony, we would stipulate that over our objection, if they were permitted to testify, their testimony would be the same identical testimony offered in 11,132, preserving all rights unto ourselves . . . . waiving our rights under the Sixth Amendment to the Constitution of the United States only.

COURT.—Mr. Dailey, will you make the same stipulation as Mr. McGee?

(Conference between counsel.)

Mr. McGEE.—Counsel agrees that the stipulation may go as to his client in view of the reservations that we have made, and with a further understanding that when the testimony is offered, we will make a blanket objection and move to have it stricken.

Mr. FINK.—I now make formal offer of the testimony of Messrs. Kirkley, Haley, Ohman, O'Neill, Keys, Roberts, and McNichols, on both direct and cross-examination as heretofore given. The testimony of Mr. Stribling, also. That testimony is offered as applying to indictment 11,785 as well as to 11,132.

Mr. McGEE.—I understand the district attorney includes in that offer all the objections, exceptions, rulings of the Court, and exhibits.

COURT.—All proceedings whatsoever.

Mr. McGEE.—Now, at this time, comes the defendants Gee Sue Tom and the other one and ob-

(Testimony of J. H. McNichols.)

jects to the reception of any testimony on all the grounds heretofore stated incorporated *in haec verba* and the additional ground that it is incompetent, irrelevant and immaterial and that the said defendants have heretofore been placed in jeopardy and also move that all the testimony applicable to the consolidation of the action #11,785 be stricken from the record, and that the jury be instructed to disregard it.

COURT.—Objection overruled. Motion denied. Exception saved.

**Testimony of J. H. McNichols, for the Government  
(Recalled).**

J. H. McNICHOLS, a witness produced on behalf of plaintiff, being recalled on behalf of plaintiff for further direct examination, testified in substance as follows: [74]

Direct Examination.

(Questions by Mr. FINK.)

I have with me the waybilling baggage out record of the Western Pacific Railway covering from April 19, 1922, until May 20, 1922. Marked Government's Exhibit 9. There were two Chinese delivered this suitcase to me on May 1st. One of them had a railroad ticket Western Pacific to Reno. He presented that ticket and the suitcase to be checked. I presented the valuation certificate for him to sign. He refused it, saying he couldn't write. I told him I couldn't check it without he

(Testimony of J. H. McNichols.)

signing the valuation slip and he stepped back and had a conversation with the other Chinaman and came forward again and signed it and put a value on it of \$25 with the name F. T. Henry. I checked his ticket.

Cross-examination.

(By Mr. DAILY.)

Government's Exhibit 6 was signed by the Chinese and Government's Exhibit 5 was the ticket presented to me. I identify the ticket as the one by the station stamp on the back, May 1st, Oakland Depot, also the number. I looked up the numbers and that is the only ticket sold that day. And that is the ticket upon which the baggage was checked, and it was the only ticket that was sold that day to Reno.

Whereupon the plaintiff rests its case in chief.

Mr. McGEE.—I think, your Honor, as to the defendant I represent, Gee Sue Tom, I will waive the opening statement. I presume Mr. McNichols, having been called out of order, it is not necessary to revive the motion for a directed verdict. That is considered as having been made together with all other motions.

COURT.—You certainly have covered that point.

The defendants, to maintain the issues on their part to be maintained, introduced and offered in evidence the following testimony: [75]

**Testimony of Hon Won Chong, for Defendants.**

Defendant HON WON CHONG, being called in his own behalf and being first duly sworn, testified as follows, through Interpreter H. EMBERT LEE, also duly sworn:

**Direct Examination.**

(By Mr. DAILY.)

I was born in China, Gin Pang District, 26 years ago; studied English in a school in China for a little over a year. While I went to school I did some kind of business. I came to the United States March 22, 1922. At this point he produced his certificate of identification issued by the labor department, marked Defendant's Exhibit "A." When I first came to the United States I lived on Stockton Street for 11 or 12 days. I went to Vallejo about March 25 or 26th and stayed there over a month, where I worked in a Chinese store as a cook. Came back to San Francisco about the 6th or 7th of May. I was not in San Francisco on May 1st, 2d, or 3d. I never saw the defendant Gee Sue Tom or knew of him until I met him in the courtroom in September. Never saw him before that day. When I returned to San Francisco on May 8th, Fong Ting wanted me to keep his room for him. That was room 38, #1040 Stockton Street. I never mailed Government's Exhibit 1 to Gee Toy at Reno, Nevada, and I never saw that letter before. None of the writing on that letter was put on by me. I am not F. T.



(Testimony of Hon Won Chong.)

Henry, 1040 Stockton Street, San Francisco, shown on that letter. I have never seen its contents. I have never seen Government's Exhibit #6 before and never signed F. T. Henry's name to it, nor is that in my handwriting. I never purchased Government's Exhibit 5, the ticket to Reno. I was not in Oakland, California, on May 1, 1922. I was in Vallejo that day. I never checked any baggage from Oakland to Reno, Nevada, on May 1st or any other day. I never placed Government Exhibit 3 on the suitcase. Government's Exhibit 5, ticket, was handed to me by Fong Ting about May 6th or 7th. He gave me [76] the ticket and the key of the mail-box to keep until he came back. I never had baggage check #409250. I do not know Fong Ting by any other name. At the time he gave me the ticket he told me to keep the ticket and the keys and to watch his room until he came back. I have seen Government's Exhibit 8 before. About the 9th of May the postman came up and handed me this card and also a pencil for me to sign this name and I signed that name on the card. I signed the name because Fong Ting instructed me when he left, if any mail comes for F. T. Henry to take care of it. I am married. My wife and children are in China but were not at 1040 Stockton Street on May 9th. I have never been in Reno, Nevada, or in Oakland, California. I have never seen suitcase Government's Exhibit #2, nor its contents before this. I never agreed with anybody to possess any of the contents of that suitcase, nor



(Testimony of Hon Won Chong.)

did I have any understanding with anybody relative to that suitcase or its contents. The postman just gave me Exhibit 8, the card, but he never gave me the letter. When he gave me the card he had the letter in his hand. I first saw the letter May 9th. I learned to write English in China. I never signed the name F. T. Henry before I signed it on this card. I never received or sent any mail in the name of F. T. Henry. I signed the name F. T. Henry on this card because he told me if any letter comes in the name of F. T. Henry for me to sign receipt for it.

Cross-examination.

(By Mr. FINK.)

I got to Vallejo by boat about March 25th or 26th. I first landed in San Francisco March 15th. Defendant's Exhibit "A" was given to me about six or seven days after that. After I was landed on March 15th I was in San Francisco for 11 or 12 days. I stayed in Vallejo a little over a month, and came back to San Francisco about May 6th or 7th by boat. I first lived at 721 Clay Street for about ten days. About two days after I landed I first [77] went to 1040 Stockton Street at room 33. I never was in room 38 until about May 7th. I usually went to room 33 and took my meals there every day, commencing with two days after I landed. The name of the man in room 33 was Yee Gock. He was my father's old friend. I never saw him before I came to San Francisco. The man in room 38, Fong Tin, was not a relative of mine.

(Testimony of Hon Won Chong.)

I met him once or twice in the hallway after I landed. After I quit my work in Vallejo I came to San Francisco. I took my grip up to 1040, room 33, but found that Yee Gock and his wife were not there and I was going out and I met Fong Ting in the hallway and he asked me to come into his room. This was on May 7th. I went to his room and he and I were there alone. On the 9th only myself was in the room. On the morning of May 9th I was out taking a walk after I had my breakfast in Yee Gock's room. I left between 10 and 11 in the morning and came back after 12. I had a key to room 38 from Fong Ting and I don't know who all had keys. When Fong Ting gave me the key he also gave me the Government's exhibit 5, the ticket. That is all. He gave me the key, also the ticket, to keep until his return. Nothing else. When postman knocked on the door he asked me if F. T. Henry is in. I told him F. T. Henry was not at home. I did not understand anything else he said but he gave me pencil and also that card. I did understand what he said when he asked me whether F. T. Henry was home and I answered him in English. I had no other conversation that day with anybody in English. That is the only mail that I took for F. T. Henry. Prior to the 9th day of May, 1922, I never wrote the name of F. T. Henry in English. I never started to open the registered letter, for the letter was in his hands. I just signed the card. He never gave me the letter. I do not know what morphine, cocaine, or

(Testimony of Hon Won Chong.)

smoking opium is, nor ever heard of any one of them. Henry told me to give a receipt for any registered mail that came for him. He didn't tell me anything further to do about the mail; he especially [78] mentioned registered letter and told me any letter or anything came to receipt for it. I did not know what kind of a [79] paper that was, so I put the ticket in my pocket. I worked in Bakersfield after the 20th of May. I never talked to the officers about Bakersfield on May 9th, and deny that in the presence of H. S. Keyes, Mr. Haley and Mr. Roberts, state that I had been in Bakersfield. It might have been the other boy who was there at the time, who came along at the time they arrested me. The woman belonged to the room across the hall. She was not in my room at the time the officers came. I did not make any statement to the officers relative to this woman. Fong Ting said he would be back three or four days later. I never saw him any more after that. The officers did not ask me anything about the railroad ticket.

Redirect Examination.

(By Mr. DAILY.)

I first went to Bakersfield after the 20th of May, 1922. When I first arrived in San Francisco; I went to 1040 Stockton Street every day to take my meals with Yee Gock. I first met Fong Ting there around the 18th or 19th or 20th of March. When I was landed from the Immigration my father took me to his personal friend, Yee Gock, introduced

(Testimony of Hon Won Chong.)

me to him. My father was too busy and had to go back to Fresno to work and could not stay here longer for me to get my certificate of identity. So he put me in trust to Yee Gock until I got the certificate of identity and in case he find work for me, put me to work. That is what I was doing at apartment 33, #1040 Stockton Street.

Recross-examination.

(By Mr. FINK.)

On May 7th my grip was in room 38 with some clothes in the grip.

**Testimony of Gee Sue Tom, for Defendants.**

Defendant GEE SUE TOM, being called in his own behalf and being first duly sworn, testified as follows, through interpreter H. Embert Lee, also duly sworn: [80]

Direct Examination.

(Questions by Mr. McGEE.)

I was born in San Francisco; about 49 years old; made two trips to China. At this point, Defendant's Exhibit "B," being certificate of identity of the witness, was introduced in evidence, which bears the name Hong Sue. I have lived in Reno about 19 years and have a boy, Richard Thomas Sue. At this point Defendant's Exhibit "C" was introduced, being the certificate of registration of his son, Richard Thomas Sue. I lived in San Francisco about three years during the war. About May or June, 1921, I went back to Reno to take



(Testimony of Gee Sue Tom.)

up my permanent residence. I was in San Francisco about September or October, 1921, when my wife came from China. During the year 1922 up to the time of this indictment I had not been in San Francisco. I never knew or met the other defendant Hon Won Chong, *alias* Henry. I had no occasion to correspond with him or telegraph or telephone him, nor did I ever write him any letters. I never got any letter from him, except Government Exhibit 1.

Q. Were you expecting his letter?

A. I didn't know where it came from. And I know no such man as Henry. I never received or had in my possession from Henry or anyone else any opium or morphine or derivative of opium or morphine or drugs of that character. My business is that of laborer. I work in a car shop at Sparks, Nevada, about four miles from Reno. Last year I waited on table at the station at Sparks. I have also done carpenter work and used to work in a laundry at Reno. I never had any interest in any store in Reno. I know where the Chu Kee store is and I live in a house a step and a half to the rear of the store, but it is not connected with the store. I have frequently been in the Chu Kee store and it is a Chinese general merchandise. It is owned by my brother-in-law. I have no interest in that store, but I am around that store frequently and the Immigration Bureau has the list and they know who is who in that store. I am a registered voter in Reno. I have known



(Testimony of Gee Sue Tom.)

Chief [81] of Police Kirkley for five or six years. I never went by the name of Gee Toy, nor did I ever tell him my name was Gee Toy. About three days after I was arrested he called me Gee Toy, but I didn't respond to him. All Americans call me Tom. My registered name as a voter is Tom Sue. I never knew Gee Toy. Just prior to the 3d of May I did not receive any special delivery letters as testified by Mr. Ohman, but a long, long time ago I received one. On the 3d of May after my meal I went over to the store and the proprietor told me to watch the store for him. The postman came in and I was sitting down and I got up and walked to the counter. He said, "Here is a letter for your store and the address is wrong." He handed me the letter and I just took and opened it and dumped the check out on the counter. Chief of Police and other men came and I asked them what is the matter and he told me but I didn't understand English and called for a Chinese by the name of Walter to interpret for me, that there was nothing wrong and not to pick up anything until the boss came back. The postman handed me the letter (illustrating). The postoffice had opened the letter. After putting this seal on. I just run my thumb over it to open it and dumped that check on the counter and they came and arrested me. About a minute after he gave me the letter they came and arrested me. When I got the letter I didn't know there was a baggage check in it. I had not been expecting it. I never saw the suitcase,

(Testimony of Gee Sue Tom.)

Government's Exhibit 2, before I was arrested, nor its contents and was not expecting them by express or by baggage transfer or any other way. I never had any dealings nor agreement or understanding with anybody with reference to this case and these drugs or any suitcase or any drugs. I never was known to anybody as Gee Toy. I never knew a Mr. Henry in Stockton, California, or of Stockton Street, San Francisco, California, and I do not recognize the handwriting on the envelope. I did not have a bank account at this time anywhere. I did not have [82] any money to pay for a thousand dollars worth of drugs. It was not for me. I haven't got any money. My person and store was searched at the time of the arrest. Just searched a little bit. I did not, on May 1st or any other time, ever have an agreement in writing or telephone or by telegraph, that I and Hon Won Chong, sometimes called Henry, were to have in our possession drugs.

Cross-examination.

(Questions by Mr. FINK.)

I was born in the United States; was educated in China and never went to school in the United States. I was four years old when I went to China and stayed there about twenty years. I am known by the names of Tom Gee Sue or Gee Sue Tom. All American people in Reno call me Ah Tom. Hong Sue, that is my name. I was never known as Gee Fox Song. Gee Fook Sang is my brother-in-law. At the time I went back to Reno and took

(Testimony of Gee Sue Tom.)

charge of the store, Gee Fook Sang was in jail. He was in the store in the month of May, 1922. I don't know where he was in jail. He went before I came to Reno. I didn't visit him while he was away. When I was at leisure I went to that store and sometimes I went there to buy provisions. When I was working I may have been in the store and when I was not working I spend a little more time there. In the month of May, 1922, I was not working. It is pretty hard to say how much time I put in there. I know Chief of Police Kirkley but I never talked to him. I did not always go back of the counter. I had nothing to do with the mail in the store. About three or four minutes before they delivered this letter the proprietor of the store having the intention to lease a new building, told me to look after the store while he took the lease up to see his attorney. I went back to Reno in 1921 to take over an old laundry I used to have, but it didn't come up. The postman told me the letter was for us, but was misdirected, so he asked me to open it. Just myself and postman in the store at that time. I understood in a common way [83] what the postman said to me but I opened the letter and they came and arrested me. Very seldom had I been left in charge in the store. I don't remember how many times I watched the store, but I had been asked at other times. I had never seen Mr. Ohman before May 3d and he never delivered a letter to me before that time. I know what smoking opium is but I do not know what morphine or cocaine is.

(Testimony of Gee Sue Tom.)

Redirect Examination.

(Questions by Mr. McGEE.)

On First Street in Reno there are some Chinese boys working there that I know of.

Whereupon defendants rested their case in chief.

The interpreter then read into the record the letter in Chinese, Government's Exhibit #1. This letter is addressed to Duck Sung, written by Jak Hing. "Now, I forward by railroad express one suitcase and kindly get it. Inside contains ten pieces wooden at seventy-seven, total \$770, and ten sacks of grain sugar at twenty-three, \$230, and square sugar, five boxes at twenty-six, \$112, total, \$1,112. Please send me check for the above." The Chinese on the face of the envelope was interpreted to read, deliver this to Duck Suy.

The Chinese characters that appear on the envelope, Government's Exhibit #4, in evidence, was interpreted to read, deliver this to Soo Hoo Yee Wai.

**Testimony of H. S. Keyes, for the Government  
(Recalled in Rebuttal).**

H. S. KEYES, recalled in rebuttal as a witness in behalf of the plaintiff, testified in substance as follows:

(By Mr. FINK.)

On May 9, 1922, at room 38, 1040 Stockton Street, Defendant Hon Won Chong told me he had lived at Bakersfield and that the woman in the room was his wife. The conversation was in English, and he



(Testimony of H. S. Keyes.)

said nothing about the ticket. [84] Hon Wong was standing in the doorway of #38. I asked him if his name was F. T. Henry. He said, "Yes." I said, "Are you sure?" He said, "Yes." I said, "I have a registered letter for you, you will have to sign for it," and gave him the orange card. He signed it and I gave him the letter and arrested him.

Cross-examination.

(By Mr. DAILY.)

He identified himself by telling his name. He said he was sure he was F. T. Henry. The conversation was in English, good English. I asked him if this woman was his wife after the other officers came in. There was a Chinese baby about eight months old there. I asked her if she was his wife and she said "Yes."

**Testimony of P. A. Robbins, for the Government  
(In Rebuttal).**

P. A. ROBBINS, a witness called by the Government in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. FINK.)

I am an inspector in charge of the United States Immigration Service, San Francisco. I am familiar with the identification certificates given to Chinese. Witness was shown certificate of Hon Won Chong. This certificate was issued March 23. It shows that the holder was admitted at San Francisco



(Testimony of P. A. Robbins.)

on February 15, 1922, on the steamer "Hoosier State." February 15, 1922, may be the date of the admission or of the arrival of the boat.

Cross-examination.

(By Mr. McGEE.)

It frequently happens when an immigrant comes from the Orient it sometimes takes ten days or three weeks or sometimes more to land. It would be impossible for me to state from looking at this certificate whether this is his first, second, or third arrival. [85]

**Testimony of A. W. Roberts, for the Government  
(Recalled in Rebuttal).**

A. W. ROBERTS, recalled in rebuttal as a witness on behalf of plaintiff, testified in substance as follows:

(By Mr. FINK.)

On the 9th of May, 1922, at room 38, 1040 Stockton Street, defendant Hon Won Chong, when we questioned him about some checks in his pocket, he explained to us that he had lived at Bakersfield. The defendant Hon Wong Chong, on being questioned, stated that the woman in the room was his wife, and on her being questioned, she stated the same. The conversation was in English.

Cross-examination.

(By Mr. DAILY.)

I have not the checks and I do not remember whether the names F. T. Henry and Hon Won Chong were on the checks.

**Testimony of H. Haley, for the Government  
(Recalled in Rebuttal).**

H. HALEY, recalled in rebuttal as a witness on behalf of plaintiff, testified in substance as follows:

(By Mr. FINK.)

On May 9th, 1922, at 1040 Stockton Street, defendant Hon Won Chong told me he had been to Bakersfield and lived there. These were not checks that he had. They were duplicates of drafts of money sent to China. I always knew the defendant, Gee Sue Tom as Gee Toy; I have sometimes heard him go by the name of Ah Tom.

**Testimony of J. M. Kirkley, for the Government  
(Recalled in Rebuttal).**

J. M. KIRKLEY, recalled in rebuttal as a witness on behalf of plaintiff, testified in substance as follows:

(By Mr. FINK.)

I know the defendant Gee Sue Tom, *alias* Gee Toy, by the name of Tom and Ah Tom.

WHEREUPON the plaintiff rested its case in rebuttal. [86]

**Testimony of Hon Won Chong, for Defendants  
(Recalled in Surrebuttal).**

HON WON CHONG, a witness produced in surrebuttal on behalf of defendants, being first duly sworn, testified in substance as follows:

(Questions by Mr. DAILY.)

I was never in Bakersfield, California, prior to

May 9th, 1922, and did not tell the narcotic officers that I had been there prior to May 9, 1922. I did not tell the officers that the woman at apartment 38, 1040 Stockton Street was my wife.

WHEREUPON the defendants rested their case in surrebuttal.

Mr. McGEE.—At this time, briefly, and by reference merely, we renew *in haec verba* and on all the grounds and points the motions made to quash, abate, and ask the Court at this time to direct the jury to return a verdict for the defendant, Gee Sue Tom.

COURT.—Motion denied.

Mr. DAILY.—Same motion for Hon Won Chong.

COURT.—Motion denied.

Exceptions allowed in both cases.

The foregoing contains a resume of the testimony and evidence, both oral and documentary, and a full and complete statement of the proceedings in the case. At the close of the arguments of the respective counsel, the Court charged the jury, as follows, and the following are the instructions given by the Court to the jury:

### Instructions of the Court to the Jury.

The COURT (Orally).—Gentlemen of the Jury: In this case there are two indictments. These indictments, however, charge but a single offense and upon them you can render but a single verdict, of either guilty or not guilty. That is to say, you are, for the [87] purposes of your verdict, to consider

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the second indictment as a mere amendment or correction of the first.

Now this indictment charges that these defendants entered into a combination or conspiracy by which they agreed to violate the Act of Congress, which is commonly known as the Harrison Narcotic Act. That is to say, they agreed together between themselves and various other persons, that they would have in their possession opium, morphine, and cocaine without having registered or having paid the tax thereon.

You are instructed in the first place, that under the Act of Congress mentioned in this indictment, it is a crime to have in possession opium, morphine, or cocaine, unless the person so having in possession has registered and paid the prescribed tax. There is no claim or pretense here that either of these defendants has registered or paid the tax, and, therefore, the possession of these drugs by either of them would constitute a crime against the United States. It is not necessary for the Government to show failure to register or pay the tax if it shows possession. In this connection, I instruct you that if you find that either of the defendants had in his possession a baggage check entitling him or them to the possession of the suitcase containing any of these drugs, then the possession of such check with knowledge of the contents of the suitcase and intent to procure the suitcase is, in law, the possession of the drugs. But these defendants are not charged with having the drugs in their possession. They are charged with a conspiracy so to do.



You are instructed that a combination, agreement, and conspiracy, which has as its object the having of these drugs in possession without registering or paying a tax is a crime against the United States. That is to say, it constitutes the crime of conspiracy. [88]

A conspiracy is defined as an agreement or combination between two or more persons to do an unlawful act, or to do a lawful act by unlawful means. The charge here is that there was an agreement and combination to violate the statute; that is, to commit an unlawful act. Common design is the essence of the charge, and while it is necessary to establish the conspiracy, to prove a combination of two or more persons by concerted action, to accomplish the unlawful purpose, it is not necessary, to constitute conspiracy, that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what that unlawful scheme was to be and the details of the plan or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, each one of said persons becomes a member of the conspiracy, although the



part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirator or conspirators.

A combination formed by two or more persons to effect an unlawful end is the conspiracy, said persons acting under a common purpose to accomplish the end designed. Furthermore, where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan and with reference to the common object is in contemplation of law, the act of the whole party and therefore the proof of such act will be evidence against any of the others who were engaged in the same conspiracy. [89]

Nor is it necessary that the Government should prove by direct evidence the entering into the unlawful combination or agreement. That combination or agreement may be proved, like any other fact, by circumstantial evidence, and if you are satisfied beyond a reasonable doubt that there was a combination or agreement from all the facts of the case, you are entitled to find there was such combination or agreement. You will readily understand, then, that if you find from the evidence that Hon Won Chong and Gee Sue Tom came to an understanding or agreement in any manner whatsoever that they should have in their possession opium, cocaine, or morphine, without registering and without paying the tax, and if you further find that in pursuance of that agreement either one or both of them did have possession of such drugs without registering or paying the tax, then I in-

struct you that the crime of conspiracy is complete and you must find the defendants guilty.

In order to find them guilty, you need not find there was an agreement in so many words. It is sufficient if you find from all the evidence that there was a meeting of their minds upon the subject, followed by the actual possession of the drugs by either of them. A conspiracy, like an ordinary contract, is established when the minds of the parties meet in an agreement to do a definite thing. The agreement or meeting of the minds need not be in writing. It need not even be expressed in so many words. It is sufficient, if there is an agreement of two or more persons, to carry out and execute some unlawful purpose and some act or acts done in pursuance of that agreement. This joint assent of minds may be proved by direct testimony or may be inferred from facts which would satisfy the jury that an unlawful combination has been formed. It is not necessary that all of the parties have met together and come to an explicit and formal agreement, or that they should agree formally upon all of the details or plans by which the unlawful combination [90] should be made effective. That inference is sufficiently proven if the jury is satisfied beyond a reasonable doubt that the parties have entered into an agreement to accomplish the common and unlawful design which was arrived at by mutual understanding, followed by some act done by any of the parties for the purpose of carrying it into execution.

It is not necessary that each of the parties should in person commit the unlawful act if such unlawful

act is a part of the plan for which the combination was formed, for if the unlawful agreement has been proved, the act of one in pursuance of said unlawful agreement is considered the act of all. Each may perform separate and distinct acts in forwarding the design, and proof is not required of participation by each in every step by which the unlawful scheme is carried forward.

Before you consider whether or not any overt act was committed you must find from the evidence beyond a reasonable doubt that a conspiracy existed as alleged in the indictment. And proof of the overt act is not in and of itself proof of the conspiracy, because the overt act must be an act independent of the conspiracy and subsequent to and following the conspiracy and done or performed for the purpose of effecting the object of said conspiracy.

You may, however, consider any overt act which you may find was proven as evidence bearing upon the question as to whether there was a conspiracy. The overt act must be one independent of the conspiracy or agreement and the proof must establish beyond a reasonable doubt that the conspiracy or agreement which is set forth in the indictment and which is the gist of this case had been formed before and was in existence at the time of the overt act.

I have said to you that the offense may be established by circumstantial evidence, but circumstantial evidence, to warrant a conviction in a criminal case must be of such a character as to [91] exclude every reasonable hypothesis but that of guilt

of the offense imputed to the defendants, or, in other words, the facts proved must be all consistent with and point to their guilt only and inconsistent with their innocence. The hypothesis of guilt should flow naturally from the facts proved and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or guilt the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted.

The defendants in this case, as in all criminal cases, are presumed by law to be innocent. This presumption is not *be* be regarded by you as a mere fiction of the law, but it is a fixed fact in the case to be considered by you during the taking of the testimony and to remain in your minds as such fixed fact during all the steps in this proceeding, and even in your deliberations in the jury room until verdicts have finally been reached. This presumption of innocence is, of itself, unless overcome by proof satisfactory to you beyond a reasonable doubt, sufficient to warrant an acquittal.

In this case an indictment has been returned by the grand jury against the defendants, and the defendants and each of them are being tried under that indictment. The mere fact that these defendants have been indicted is no evidence against them or either of them in any shape or manner, either directly or indirectly, or by intendment, inference, or presumption.

By reasonable doubt is meant such a state of the juror's mind after comparison and consideration of all the evidence, he cannot say he feels an abiding



conviction amounting to a moral certainty of the truth of the charge. This doctrine of reasonable doubt is to be applied by you to every material element of the offense charged, and should you entertain reasonable doubt as to the truth of any material element of the offense charged, it will be your duty to [92] resolve this doubt in favor of the defendant and acquit him.

The Court instructs you that the defendants have been examined as witnesses in their own behalf, and in considering the weight and effect to be given to the evidence of either or both of the defendants you may consider the manner and demeanor of each upon the witness-stand, the probability of the statements made by each of them taken in connection with all the evidence in the case, and if convincing and carrying with it a belief in its truth, you must act upon it. If not you have a right to reject it. You are, however, entitled to take into consideration the interest which such defendants have in the outcome of the case in weighing the evidence.

One cannot be convicted of a conspiracy unless there was an agreement with some other person to violate the law. If you find one of the defendants not guilty you cannot find the other defendant guilty unless you are convinced beyond a reasonable doubt that such other defendant conspired with some person or persons unknown.

**JUROR.**—May I ask a question? In the beginning of your instructions with reference to the railroad ticket, I did not get that quite clearly.

**COURT.**—I instruct you that if you find that



either of the defendants had in his possession a baggage check entitling him or them to the possession of a suitcase containing any of these drugs, then the possession of such check with knowledge of the contents of the suitcase and an intent to procure the suitcase is in law possession of the drugs.

Mr. SAPIRO.—Will your Honor please read the very next sentence—they are not charged with possession.

COURT.—I read that, Mr. Sapiro.

Mr. SAPIRO.—Shall we take our exceptions now?

COURT.—Yes, exceptions not taken in the presence of the [93] jury are deemed waived.

Mr. SAPIRO.—May it please the Court, defendants and both of them take exception to that portion of the Court's charge referring to the possession of the baggage ticket, and particularly the following suggestion; where the Court said, these persons are not charged with having possession, inasmuch as the overt act charged in the indictment is possession contrary to law.

Second. The defendants and each of them except to the charge of the Court at the commencement thereof where it charges the jury that the second indictment is to be taken as an amendment to the first indictment.

Third. The defendants and each of them except to the charge of the Court where the Court charges the jury that the crime charged in this indictment is a violation of the Harrison Act and failure to register; that in the latter portion of the charge

the Court instructs the jury that these persons are charged with a conspiracy, and I think that portion of the charge is confusing in that the only charge here is, they are charged with the crime of conspiracy.

THEREUPON, the jury retired to deliberate upon its verdict and returned into court, and the following proceedings were had:

After the jury had returned a verdict of guilty, the Court set the 7th day of April, 1923, as the day of sentence. Upon said 7th day of April, 1923, and before sentence was imposed upon defendants Hon Won Chong and Gee Sue Tom, there was thereupon presented the following motion in arrest of judgment:

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 11,132.

UNITED STATES OF AMERICA

vs.

HON WON CHONG and GEE SUE TOM,  
Defendants.

**Motion in Arrest of Judgment. [94]**

Come now Hon Won Chong and Gee Sue Tom, the defendants in the above-styled and numbered cause, and against whom a verdict of guilty was rendered in said cause on the 27th day of March, 1923, and each of said defendants for himself moves the Court

to arrest the judgment against him and each of them and hold for naught the verdict of guilty rendered against him, for the following reasons:

1. Because the bill of indictment in this cause is insufficient to support any judgment against him, in this: the indictment contains but one count, and by such indictment it is sought to charge him and the other defendant with an unlawful conspiracy to violate a law of the United States. Such indictment is insufficient to charge a conspiracy to violate a law of the United States in that the purpose or object of the conspiracy is not set out with sufficient or proper clearness or certainty. The indictment charges that the said defendants did knowingly, unlawfully, wilfully, and feloniously conspire, combine, confederate and agree together, with, between and among themselves and with divers other persons to the Grand Jurors aforesaid unknown, to unlawfully, wilfully, and feloniously have in their possession certain narcotic drugs, etc., and does not further describe, declare, or set out the object or purpose of the conspiracy. The ownership of said goods is not alleged; no facts are alleged from which it can be determined by an inspection of the indictment how or in which manner the alleged possession is unlawful, and all the allegations are mere conclusions of law, and are consistent with lawful and rightful possession.

2. Because no facts are alleged in the said indictment from which it can be determined by an inspection of the indictment that the overt acts charged to have been committed by the defendants

Hon Won Chong and Gee Sue Tom or either of them were committed in pursuance of and to effect the object of the alleged conspiracy. In other words, no facts are alleged in said indictment from which [95] it is made to appear from an inspection of the said indictment from which it can be determined that the purpose or object of the alleged conspiracy was to possess certain narcotics unlawfully and feloniously; that the said indictment is vague, uncertain, indefinite, and insufficient, in that the same does not sufficiently aver or state the elements of the alleged crime or offense charged therein, nor the ingredients of which said alleged crime or offense is composed; that no unlawful means, or any means, are set out in said indictment used by said defendants or either of them in carrying out the alleged conspiracy or combination.

3. That neither said indictment nor any part thereof, alleges any fact or facts showing the defendants or either of them was a party to any unlawful contract, conspiracy, or combination to violate the Act of Congress of December 17, 1914, as amended February 24, 1919, or any other law of the United States. That the allegations charging said defendants and each of them, in said indictment, and in each and every part thereof with a conspiracy, are conclusions of law.

4. Because it does not appear from the allegations of said indictment with sufficient clearness or certainty or from the allegations of facts in said indictment that the object or purpose of the alleged conspiracy was to commit an offense against the



laws of the United States, and that some overt act was committed by one of the alleged conspirators in furtherance of or for the purpose of carrying out the alleged conspiracy.

5. Because on the trial of this cause, the evidence was insufficient to show jurisdiction in this court to hear and determine this cause. That it affirmatively appears from the record and minutes of this Court, that an objection was interposed by the defendants and each of them, to the introduction of any testimony after the first witness was sworn on the ground that the indictment [96] did not state facts sufficient to charge a public offense, and motion was made to quash the indictment; that after the Government rested both of said motions were renewed and motion was made that the Court direct the jury to return a verdict of not guilty; that the Court, on motion of the district attorney, consolidated or substituted an indictment numbered 11,785 with or for the indictment under which these defendants were being tried; that both of said indictments are now pending and neither has been dismissed; that said action of the Court was unwarranted in law and in violation of the constitutional guaranties of the defendants, and each of them; that defendants have never been apprised, nor are they now, nor can they ascertain under which indictment the jury have found a verdict of guilty; that if this Honorable Court ever did have jurisdiction of this cause, the same was lost when motion to quash and direct the jury to return a verdict of not guilty was interposed by the defendants.



6. That neither the first indictment number 11132 or the second indictment number 11785, nor the consolidated indictment show the commission of any offense by the defendants or either of them against any law of the United States for the reasons heretofore set forth in paragraphs 1, 2, 3, and 4 of this motion.

7. That the verdict of the jury is not supported by the evidence in the case.

8. The evidence in the case does not prove or tend to prove that the said Hon Won Chong and the said Gee Sue Tom or any or either of them, was a member of the said conspiracy, charged in the indictment.

9. The evidence does not prove or tend to prove that there ever was a conspiracy as alleged in the indictment.

10. The evidence in the case does not prove or tend to prove that the said Hon Won Chong and Gee Sue Tom or any or either [97] of them, was guilty of the offense charged in the indictment.

11. The verdict in said case, if supported by any testimony at all, is not sustained by sufficient evidence and is contrary to the weight of the evidence.

The defendants and each of them therefore pray that this motion be sustained and that the judgment of conviction against him and each of them be arrested and withheld and that the conviction of these defendants and each of them be declared null and void, and that he have all such other orders as may be just and proper in the premises, and he will ever pray.

Dated April 7, 1923.

R. L. DAILY,  
C. A. A. McGEE and  
J. H. SAPIRO,  
Attorneys for Defendants.

And the aforesaid motion in arrest of judgment having been argued by counsel for defendant and for plaintiff, respectively, the Court denied said motion, to which exception was duly taken, and thereupon on the said 7th day of April, 1923, the Court rendered its judgment and sentence upon the defendants Hon Won Chong and Gee Sue Tom and upon each of them, and granted to said defendants and to each of them thirty (30) days within which to prepare and serve upon plaintiff a draft of their and his proposed bill of exceptions, upon writ of error herein.

Concerning the embodiment of exhibits in and as a part of this bill of exceptions, the respective parties hereto have stipulated, and the Court has made its order as follows, to wit: [98]

In the Southern Division of the United States District Court for Northern District of California,  
First Division.

11,132.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

HONG WONG CHONG, etc., and GEE SUE  
TOM, etc.,

Defendants.

**Stipulation and Order Transmitting Certain Exhibits to the United States Circuit Court of Appeals for the Ninth Circuit and Making the Same a Part of the Bill of Exceptions Without Incorporation at Large Therein.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that all United States' exhibits and all defendants' exhibits may be transmitted in the original by the clerk of the above-entitled court to the Circuit Court of Appeals for the Ninth Circuit, and that said exhibits may be included as and deemed a part of the bill of exceptions upon writ of error herein, with the same effect in all respects as though incorporated at large in said bill of exceptions.

Dated: San Francisco, California, August 9, 1923.

JOHN T. WILLIAMS,  
United States Attorney.  
C. A. A. McGEE and  
J. H. SAPIRO and  
R. L. DAILY,  
Attorneys for Defendant.

Now, on this day, for good cause shown and pursuant to the above and foregoing stipulation, the clerk of the above-entitled court is hereby directed and ordered to transmit all of the United States' exhibits and all of the defendants' exhibits, in the original to the United States Circuit Court of Appeals for the Ninth Circuit. [99]

AND IT IS HEREBY ORDERED that said exhibit shall be included as and deemed a part of the bill of exceptions upon writ of error herein with the same effect in all respects as though incorporated at large in said bill of exceptions.

Dated: San Francisco, California, August 9, 1923.

JOHN S. PARTRIDGE,

District Judge.

The above and foregoing contains all of the evidence of any and every character given, and all of the proceedings had upon the entire trial of this cause; and all of the instructions of the Court to the jury; and all of the proceedings had on defendants' motion for an arrest of judgment; and all of the proceedings relating to the judgment and sentence pronounced and imposed upon the defendants herein, and upon each of them.

And now, within the time allowed by law and the rules and orders of this Court, duly and regularly made in this behalf, the defendants Hon Won Chong and Gee Sue Tom, and each of them, hereby propose the above and foregoing as and for their bill of exceptions upon writ of error herein, and pray that the same be settled, allowed, signed and authenticated by this Court as in proper form and as conforming to the truth and as the true bill of exceptions herein, and that it be made a part of the record in this cause.



Dated at San Francisco, California, this 28th day  
of April, 1923.

C. A. A. McGEE and  
J. H. SAPIRO,

Attorneys for Defendant Gee Sue Tom,  
R. L. DAILY,

Attorney for Defendant Hon Won Chong. [100]

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In the Southern Division of the United States  
District Court for the Northern District of  
California, First Division.

11,132.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HON WON CHONG, etc., and GEE SUE TOM,  
Defendants.

**Notice of Presentation to Plaintiff of Defendants'  
Proposed Bill of Exceptions.**

To the United States of America, Plaintiff, and to  
Its Attorney, JOHN T. WILLIAMS, Esq.:

You will please take notice that the above and  
foregoing constitutes and is the proposed bill of  
exceptions of the defendants Hon Won Chong and  
Gee Sue Tom, and of each of them upon their and  
his writ of error in the above-entitled cause, and  
that said defendants and each of them will apply  
to the above-entitled court to settle, allow, sign,  
and authenticate the same as in proper form and



as conforming to the truth and as the true bill of exceptions herein and to make it a part of the record in this cause.

Dated San Francisco, California, April 28, 1923.

C. A. A. McGEE and

J. H. SAPIRO,

Attorneys for Defendant, Gee Sue Tom.

R. L. DAILY,

Attorney for Defendant Hon Won Chong.

Due and legal service of the above and foregoing proposed bill of exceptions by copy is hereby admitted this — day of April, 1923.

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United States Attorney. [101]

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In the Southern Division of the United States  
District Court for the Northern District of  
California, First Division.

11,132.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HON WON CHONG, etc., and GEE SUE TOM,  
Defendants.

**Stipulation Re Bill of Exceptions.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the above and foregoing proposed bill of exceptions upon writ of error herein has been presented within the time allowed by law and the rules and

orders of this Court duly and regularly made in this behalf, and that the same is in proper form and conforms to the truth, and that it may be settled, allowed, signed and authenticated by this Court as the true bill of exceptions herein, and that it may be made a part of the record in this cause.

Dated at San Francisco, California, this 9th day of August, 1923.

JOHN T. WILLIAMS,  
S.,

United States Attorney.

C. A. A. McGEE and

J. H. SAPIRO,

Attorneys for Defendant, Gee Sue Tom.

R. L. DAILY,

Attorney for Defendant Hon Won Chong. [102]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

11,132.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HON WON CHONG, etc., and GEE SUE TOM,  
etc.,

Defendants.

**Order Settling, Allowing, Signing and Authenticating Proposed Bill of Exceptions and Making the Same a Part of the Record.**

The above and foregoing bill of exceptions, duly proposed by the defendants, Hon Won Chong and Gee Sue Tom, and each of them and duly agreed upon by the respective parties hereto, having been presented to the Court within the time allowed and required by law and by the rules and orders of this Court duly and regularly made in that behalf, is hereby settled, allowed, signed and authenticated as in proper form and as conforming to the truth and as the true bill of exceptions herein and is hereby made a part of the record in this cause.

Dated at San Francisco, California, this 9th day of August, 1923.

JOHN S. PARTRIDGE,  
Judge of the District Court of the United States  
for the Northern District of California.

Due service of the within bill of exceptions is hereby admitted this —— day of April, 1923.

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United States Attorney.

[Endorsed]: Filed Aug. 9, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.  
[103]

**(Bond to Appear on Writ of Error—Hon Won Chong.)**

11,785—11,132.

United States of America,  
Northern District of California,—ss.

KNOW ALL MEN BY THESE PRESENTS, that we, Hon Won Chong (true name Hong Wo Chong), as principal, and L. C. Tamm and C. U. Barlow, as sureties, are held and firmly bound unto the United States of America, in the sum of Five Thousand (5000) Dollars, to be paid to the said United States of America, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated the 7th day of April, in the year of our Lord one thousand nine hundred *and three*:

THE CONDITION of the above recognizance is such, that, whereas a judgment has been entered by the United States District Court for the Southern Division of the Northern District of California, and filed on the 7 day of April, A. D. 1923, in the Southern Division of the United States District Court for the Northern District of California, sentencing the said Hon Won Chong with 2 years' imprisonment in the U. S. Penitentiary, at McNeil's Island, and a stay of execution for 30 days, pending appeal having been granted said defendant and bail fixed in the amount of Five Thousand

(5000) Dollars, the 7 day of April A. D. 1923, to wit: at the district and division aforesaid.

AND WHEREAS, the said Hon Won Chong has been required to give a recognizance, with sureties, in the sum of Five Thousand (5000) Dollars for his appearance before said United States District Court whenever required.

NOW, THEREFORE, if the said Hon Won Chong shall personally appear at the Southern Division of the United States District Court for the Northern District of California, First Division, to be holden at the courtroom of said Court, in the city and county of San Francisco, on the 7 day of May, A. D. 1923, at ten o'clock in the forenoon of that day, and afterwards [104] whenever or wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said court without leave first obtained, and if convicted shall appear for judgment and render himself in execution thereof, then this recognizance shall be void, otherwise, to remain in full effect and virtue.

HONG WO CHONG, [Seal]

Address: \_\_\_\_\_.

L. CHAS. TAMM. [Seal]

C. U. BARLOW. [Seal]



Acknowledged to before me and approved the day and year first above written.

[Seal]

THOMAS E. HAYDEN,

United States Commissioner, for the Northern District of California, at S. F.

Name and Address of Attorney for Defendant:

\_\_\_\_\_ Address: \_\_\_\_\_ [105]

United States of America,  
Northern District of California,—ss.

L. C. Tamm, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said district and reside at No. 369 Bartlett Street, in the city of San Francisco, State of California, and by occupation realtor.

That I am worth the sum of Five Thousand (5000) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name, consists in part as follows:

Real estate, consisting of house and lot #369 Bartlett St., S. F., val. \$6500; ranch, Soledad, Cal. 1440 acres val. 25,000, and 5 lots Redwood City, val. 2750.

That the encumbrances on the foregoing property are as follows: None. That my total net assets above all liabilities and obligations on other bonds is the sum of \$30,000. That I am not surety

upon outstanding penal bonds, now in force, aggregating total penalty \$——.

L. CHAS. TAMM. [Seal]

Subscribed and sworn to before me this 7 day of April A. D. 1923.

[Seal]

THOMAS E. HAYDEN,

United States Commissioner for the Northern District of California. [106]

United States of America,  
Northern District of California,—ss.

C. U. Barlow, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said district and reside at No. 105 Nova Drive Street, in the city of Piedmont, State of California, and by occupation realtor.

That I am worth the sum of Five Thousand (5000) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name consists in part as follows:

Real estate consisting of House and Lot #105 Nova Drive, Piedmont, val. 15,000; Ranch, Valley Cress Gardens, Alameda, val. 10,000.

That the encumbrances of the foregoing property are as follows: None.

That my total net assets, above all liabilities and obligations on other bonds, is the sum of \$30,000.

That I am not surety upon outstanding penal bonds, now in force, aggregating total penalty \$——.

C. U. BARLOW. [Seal]

Subscribed and sworn to before me this 7 day of April A. D. 1923.

[Seal]

THOMAS E. HAYDEN,  
United States Commissioner, for the Northern District of California.

[Endorsed]: Filed Apr. 9, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[107]

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**(Bond to Appear on Writ of Error—Gee Sue Tom.)**

11,785—11,132.

United States of America,  
Northern District of California,—ss.

KNOW ALL MEN BY THESE PRESENTS, that we, Tom Gee Sue, as principal, and L. C. Tamm and C. U. Barlow, as sureties, are held and firmly bound unto the United States of America, in the sum of Five Thousand (5000) Dollars, to be paid to the said United States of America, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated the 7th day of April, in the year of our Lord one thousand nine hundred *and three*:

THE CONDITION of the above recognizance is such that, whereas, a judgment has been entered

by the United States District Court for the Southern Division of the Northern District of California, and filed on the 7th day of April, A. D. 1923, in the Southern Division of the United States District Court for the Northern District of California, sentencing the said Tom Gee Sue or (Sui Gee Tom) with *to* 2 years' imprisonment in the U. S. Penitentiary at McNeils Island, on motion, a stay of execution for 30 days, pending appeal was granted said defendant, and bail fixed at Five Thousand (5000) Dollars. Committed on or about the — day of —, A. D. 192—, to wit, at the district and division aforesaid.

AND WHEREAS, the said Tom Gee Sue has been required to give a recognizance, with sureties, in the sum of Five Thousand (5000) Dollars for his appearance before said United States District Court whenever required:

NOW, THEREFORE, if the said Tom Gee Sue shall personally appear at the Southern Division of the United States District Court for the Northern District of California, First Division, to be holden at the courtroom of said Court, in the city and county of San Francisco, on the 7 day of May, A. D. 1923, at ten [108] o'clock in the forenoon of that day, and afterwards whenever or wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said Court without leave first



obtained, and if convicted, shall appear for judgment and render himself in execution thereof, then this recognizance shall be void; otherwise, to remain in full effect and virtue.

TOM GEE SUE. (Seal)

Address: Reno, Nevada.

L. CHAS. TAMM. (Seal)

C. U. BARLOW. (Seal)

Acknowledged before me and approved the day and year first above written.

[Seal]

THOMAS E. HAYDEN,

United States Commissioner, for the Northern District of California, S. F.

Name and Address of Attorney for Defendant:

\_\_\_\_\_ Address: \_\_\_\_\_. [109]

United States of America,  
Northern District of California,—ss.

L. C. Tamm, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said district and reside at No. 369 Bartlett Street, in the city of San Francisco, State of California, and by occupation real estate.

That I am worth the sum of Five Thousand (5000) Dollars, the sum in the said undertaking specified as to penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name consists in part as follows:



Real estate consisting of house and lot, 369 Bartlett St., val. 6500, and ranch, Soledad, Cal., 1440 Acres; val. 25,000; 5 lots Redwood City, 2750.

That the encumbrances on the foregoing property are as follows: None.

That my total net assets, above all liabilities and obligations on other bonds, is the sum of \$30,000.

That I am not surety upon outstanding penal bonds, now in force, aggregating total penalty \$——.

L. CHAS. TAMM. (Seal)

Subscribed and sworn to before me this 7 day of April, A. D. 1923.

[Seal]

THOMAS E. HAYDEN,

United States Commissioner, for the Northern District of California. [110]

United States of America,

Northern District of California,—ss.

C. U. Barlow, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said district and reside at No. 105 Nova Drive Street in the city of Piedmont, Alameda Co., State of California, and by occupation real estate.

That I am worth the sum of Five Thousand (5000) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name, consists in part as follows:

Real estate, consisting of 105 Nova Drive, house and lot, val. \$15,000. Ranch, Valley Cress Gardens, Alameda Co., val 10,000.

That the encumbrances on the foregoing property are as follows: None.

That my total net assets, above all liabilities and obligations on other bonds is the sum of \$30,000.

That I am not surety upon outstanding penal bonds, now in force, aggregating total penalty \$——.

C. U. BARLOW. (Seal)

Subscribed and sworn to before me this 7 day of April, A. D. 1923.

[Seal]

THOMAS E. HAYDEN,

United States Commissioner for the Northern District of California.

[Endorsed]: Filed Apr. 9, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[111]

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**(Cost Bond on Writ of Error.)**

KNOW ALL MEN BY THESE PRESENTS, That we, *and* C. U. Barlow and L. C. Tamm, as principals, are held and firmly bound unto the United States of America in the full and just amount of Five Hundred and no/100 Dollars to be paid to the said United States of America, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of August, 1923, in the year of our Lord one thousand nine hundred and —.

WHEREAS, lately at a District Court of the United States for the Northern District of California in a suit depending in said court, between United States of America, plaintiff, against Hon Won Chong and Gee Sue Tom, defendants, a judgment was rendered against the said Hon Won Chong and Gee Sue Tom, and the said Hon Won Chong and Gee Sue Tom having obtained from said court writ of error to reverse the judgment in the afore-said suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California —.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said Hon Won Chong and Gee Sue Tom shall prosecute said writ of error to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

C. U. BARLOW. (Seal)

L. CHAS. TAMM. (Seal)

Acknowledged before me the day and year first above mentioned.

THOMAS S. BURNES. [112]

United States of America,  
Northern District of California,—ss.

C. U. Barlow and L. C. Tamm, being duly sworn, each for himself, deposes and says, that is a freeholder in said district and is worth the sum of Five Hundred Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

C. U. BARLOW.

L. CHAS. TAMM.

Subscribed and sworn to before me this 21st day of August, A. D. 1923.

[Seal]                      THOMAS S. BURNES,  
Notary Public in and for the City and County of  
San Francisco, State of California.

Form of bond and sufficiency of sureties approved.

JOHN S. PARTRIDGE,  
Judge.

[Endorsed]: Filed Aug. 21, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[113]

In the Southern Division of the United States District Court for Northern District of California, First Division.

11,132.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HONG WONG CHONG, etc., and GEE SUE TOM,  
etc.,

Defendants.

**Stipulation and Order Transmitting Certain Exhibits to the United States Circuit Court of Appeals for the Ninth Circuit and Making the Same a Part of the Bill of Exceptions Without Incorporation at Large Therein.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that all United States' exhibits and all defendants' exhibits may be transmitted in the original by the clerk of the above-entitled court to the Circuit Court of Appeals for the Ninth Circuit, and that said exhibits may be included as and deemed a part of the bill of exceptions upon writ of error herein, with the same effect in all respects as though incorporated at large in said bill of exceptions.



Dated: San Francisco, California, August 9th,  
1923.

JOHN T. WILLIAMS,  
United States Attorney.  
C. A. A. McGEE and  
J. H. SAPIRO and  
R. L. DAILY,  
Attorneys for Defendant.

Now, on this day, for good cause shown and pursuant to the above and foregoing stipulation, the clerk of the above-entitled court is hereby directed and ordered to transmit all of the United States exhibits and all of the defendants' exhibits, in the original to the United States Circuit Court of Appeals for the Ninth Circuit. [114]

AND IT IS HEREBY ORDERED that said exhibits shall be included as and deemed a part of the bill of exceptions upon writ of error herein with the same effect in all respects as though incorporated at large in said bill of exceptions.

Dated: San Francisco, California, August 9,  
1923.

JOHN S. PARTRIDGE,  
District Judge.

[Endorsed]: Filed Aug. 9, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.  
[115]

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 115 pages, numbered from 1 to 115, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the cases of the United States of America vs. Hon Won Chong, etc., and Gee Sue Tom, etc., Nos. 11,132—11,785, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on writ of error (copy of which is embodied herein), and the instructions of the attorneys for defendants and plaintiffs in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of Forty-four Dollars and Ninety-five Cents (\$44.95), and that the same has been paid to me by the attorneys for the plaintiffs in error herein.

Annexed hereto are the original writ of error (page 117), return to writ of error (page 118) and original citation on writ of error (page 119).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 20th day of September, A. D. 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,  
Deputy Clerk. [116]

**(Writ of Error.)****UNITED STATES OF AMERICA,—ss.**

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Hon Won Chong and Gee Sue Tom, plaintiffs in error, and United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Hon Won Chong and Gee Sue Tom, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to cor-

rect that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the United States, the 9th day of August, in the year of our Lord one thousand nine hundred and twenty-three.

[Seal]                      WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By C. W. Calbreath,  
Deputy Clerk.

Allowed by:

JOHN S. PARTRIDGE,  
Judge.

Recd. a copy August 9th, 1923.

JOHN T. WILLIAMS,  
U. S. Atty.

[Endorsed]: Nos. 11,132-11,785. United States District Court for the Northern District of California, First Division. Hon Won Chong, etc., and Gee Sue Tom, etc., Plaintiffs in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Aug. 9, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [117]

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### **Return to Writ of Error.**

The answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within writ of error.



As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 13th day of August, A. D. 1923, duly lodged in the case in this court for the within-named defendants in error.

By the Court:

[Seal]                      WALTER B. MALING,  
Clerk United States District Court, Northern Dis-  
trict of California.

By C. M. Taylor,  
Deputy Clerk. [118]

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**(Citation on Writ of Error.)**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to United States of America and to John T. Williams, Esq., United States District Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ



of error duly issued and now on file in the Clerk's office of the United States District Court for the Northern District of California, wherein Hon Won Chong and Gee Sue Tom are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 9th day of August, A. D. 1923.

JOHN S. PARTRIDGE,  
United States District Judge.

Received copy of the within August 9th, 1923.

JOHN T. WILLIAMS,  
U. S. Atty.

[Endorsed]: Nos. 11,132-11,785. United States District Court for the Northern District of California. Hon Won Chong, etc., and Gee Sue Tom, etc., Plaintiffs in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed August 9, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [119]

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[Endorsed]: No. 4112. United States Circuit Court of Appeals for the Ninth Circuit. Hon Won Chong and Gee Sue Tom, Plaintiffs in Error, vs.

United States of America, Defendant in Error.  
Transcript of Record. Upon Writ of Error to the  
Southern Division of the United States District  
Court of the Northern District of California, First  
Division.

Filed September 20, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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In the Southern Division of the United States Dis-  
trict Court in and for the Northern District of  
California, First Division.

11,132 and 11,785.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

HON WON CHONG and GEE SUE TOM,  
Defendants.

**Order Extending Time to and Including October  
9, 1923, Within Which Clerk of this Court may  
Send Authenticated Copy of Record, Proceed-  
ings, etc., to United States Circuit Court of  
Appeals.**

IT IS HEREBY ORDERED that the time  
within which the Clerk of this court may transmit  
a duly authenticated transcript of the record, pro-

ceedings and papers in this cause be extended to and including the 9th day of October, 1923.

Dated September 5, 1923.

JOHN S. PARTRIDGE,  
United States District Judge.

[Endorsed]: 11,132 and 11,785. United States District Court, Southern Division, Northern District of California, First Division. United States of America, Plaintiff, vs. Hon Won Chong and Gee Sue Tom, Defendants. Order Extending Time.

No. 4112. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including October 9, 1923, to File Record and Docket Cause. Filed Sep. 6, 1923. F. D. Monckton, Clerk. Refiled Sep. 20, 1923. F. D. Monckton, Clerk.



No. 4112

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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HON WON CHONG and GEE SUE TOM,  
*Plaintiffs in Error,*

VS.

UNITED STATES OF AMERICA,  
*Defendant in Error.*

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BRIEF FOR PLAINTIFF IN ERROR, GEE SUE TOM.

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J. H. SAPIRO,

C. A. A. MCGEE,

*Attorneys for Plaintiff in Error,*

*Gee Sue Tom.*

FILED

1907

U. S. DEPARTMENT OF JUSTICE





No. 4112

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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HON WON CHONG and GEE SUE TOM,	}
<i>Plaintiffs in Error,</i>	
VS.	
UNITED STATES OF AMERICA,	
<i>Defendant in Error.</i>	

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BRIEF FOR PLAINTIFF IN ERROR, GEE SUE TOM.

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Statement of Fact.

## THE INDICTMENT.

Plaintiffs in error in this case were prosecuted under Section 5540 U. S. Revised Statutes, the offence charged being a conspiracy to violate the Harrison Narcotic Act, being the Act of Congress of December 17, 1914, as amended February 24, 1919.

Indictment No. 11132 is set forth in full on pages 2 to 5 inclusive of the transcript of record and alleges in substance that the plaintiffs in error did

“wilfully conspire to unlawfully possess certain narcotic drugs which did not then and there bear and have affixed thereon appropriate tax paid stamps as required by the Act of Congress.”

The overt act alleged is

“that the said defendants and each of them, did, unlawfully, possess certain packages of narcotic drugs which did not then and there bear and have affixed thereon appropriate tax paid stamps as required by the aforesaid Act of Congress.”

Indictment No. 11785 is set forth in full on pages 5 to 9 of transcript—was identical with indictment No. 11132 with the following additions:

“Said defendants then and there being persons required to register and pay a tax under the provisions of the act aforesaid as amended, and said defendants not then and there having registered under the provisions of said act, and not then and there having paid the special tax provided for by the aforesaid act on said smoking opium, cocaine and morphine.”

The overt act was set out in the following language,

“said defendants did unlawfully, wilfully, and feloniously have in their possession a certain derivative of cocoa leaves, and a certain preparation and derivative of opium and morphine, said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid as amended, and said defendants not then and there having registered under the provisions of the said Act, and not then and there having paid the special tax provided for by the aforesaid act on the said cocaine, smoking opium and morphine.”

At p. 9 the defendants enter a plea of “not guilty” to indictment No. 11132.

At p. 11 the defendants enter their plea of "not guilty" to indictment No. 11785.

At p. 11, indictment No. 11132 is brought on for trial.

At p. 57, defendants object to the introduction of any testimony under the indictment on the grounds that the same does not state facts sufficient to charge a public offense, and move to quash for the same reason. Motion denied, exception saved.

At pp. 79 to 81 inclusive, defendants move the Court to instruct the jury for a directed verdict on the ground that the evidence adduced failed to prove a conspiracy as charged in the indictment.

At pp. 82 to 88 defendants renewed the motion to quash the indictment on the ground that the same does not state the facts sufficient to charge a public offense and because the said indictment does not set forth how or in what manner the alleged possession of said narcotics was unlawful.

At p. 85, the District Attorney admits that indictment No. 11132 is defective and moves the Court that the motion of defendant's counsel to quash be denied and that indictments No. 11132 and No. 11785 be consolidated.

At p. 88 trial Court denied the motion to dismiss the first indictment and granted the motion of the District Attorney to consolidate the two indictments for trial *nunc pro tunc* as of the beginning of the trial, exception saved by defendants.

At p. 90 the defendants object to the reception of any testimony under indictment No. 11785 on the grounds heretofore urged against indictment No. 11132. Objection overruled, exception saved.

At p. 107 defendants again renewed the motion to quash the indictment or indictments on all the grounds heretofore named, and requested the Court to direct the jury to return a verdict for the defendants. Motion denied, exception saved.

At pp. 107 to 116 instructions of the Court and the exceptions taken thereto in the presence of the jury.

At pp. 116 to 121, inclusive, is set forth the motion in arrest of judgment.

At pp. 32 to 50, inclusive, is set forth the assignments of error on behalf of the defendants.

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### **THE EVIDENCE.**

To sustain its case against the defendants the Government produced several witnesses who testified substantially as follows: That on or about the first day of May, 1922, two Chinese checked a suitcase on a passenger ticket from the Oakland depot of the Western Pacific Railway Company to Reno, Nevada. The witness could not identify either of the defendants as a person who was present at the time of the issuance by him of a baggage check. This witness further testified that the person to whom he issued the baggage check signed a valu-



ation slip "F. T. Henry" which was put in evidence.

To sustain its case against the defendant Gee Sue Tom, the Government produced several witnesses who testified that the Government officers at Reno intercepted a letter addressed to "Gee Toy, c/o Chew Kee Co., 129 E. First Street, Reno, Nevada", and that it was delivered to 129 E. Front Street, Reno, Nevada. The defendant Gee Sue Tom was present at that address and was asked if he was Gee Toy and having said he was, he was handed the letter and simultaneously the Government agent took the letter (Government Exhibit 1) from Gee Sue Tom and the Government agent opened the letter and took out the baggage check. The Government agent then went to the depot at Reno and procured the suitcase containing the narcotics, upon presentation of baggage check. (Testimony of Haley, p. 64, transcript.)

There is no testimony that the defendant Gee Sue Tom was ever in the business of selling narcotics nor that he had any such reputation.

The letter accompanying the baggage check was written in Chinese and is set out on page 103 of the record and is addressed to Duck Sung, written by Jak Hing and states

"Now I forward by railway express one suitcase and kindly get it. Inside contains 10 pieces wooden at 77, total \$770.00, and 10 sacks of grain sugar at 23 total \$230.00 and square sugar 5 boxes at 26, total \$112.00, total

\$1112.00, Please send me check for the above.”

The Chinese on the face of the envelope was interpreted to read “deliver this to Duck Suy”.

To sustain its case against the defendant Hon Won Chong the Government introduced the evidence of several witnesses as follows: A decoy letter was prepared in San Francisco addressed to F. T. Henry, 1040 Stockton Street, San Francisco, and was delivered by a special agent, under the guise of being a registered delivery. At apartment 38 of that address the defendant Hon Won Chong signed a receipt for said letter, using the name F. T. Henry. It is undisputed in the record and proved beyond any question from a comparison of the handwritings that the person who signed the name F. T. Henry on the valuation slip at Oakland on May 1st is not the same person who signed the registry receipt at 1040 Stockton Street, San Francisco, on May 9th. This in substance is the Government's case to prove the conspiracy and all the other material allegations of the indictment.

The defendant Gee Sue Tom testified that he was an employee in the car shops at Sparks, Nevada, about four miles from Reno, that he never had an interest in any store in Reno but that he resides adjoining the Chu Kee store which is owned by his brother-in-law. That he never knew J. T. Henry nor the defendant Hon Won Chong and that he never purchased any narcotics. That on the 3rd

of May, after his meal he went over to the store and took care of it while the proprietor went downtown to attend to some lease business. He states that the postman came in and said "Here is a letter for your store and the address is wrong." Before he opened the letter he was arrested and the letter taken from him. He claims to understand no English and did not at any time prior to or after May 1st agree to purchase or handle or possess either with the defendant or with a person by the name of Henry or anybody else any narcotics; specifically denied that he had ever used the name of or was known as Gee Toy, nor is there any proof that he was known by that name.

The defendant Hon Won Chong testified that he had been in this country about three months prior to May 1st. That being out of work he occupied the room of one F. T. Henry at 1040 Stockton Street, San Francisco. That Henry told him as he was going out of the city that he, Hon Won Chong, should receipt for any mail which would come to Henry, and presented him with a railway ticket for Reno, Nevada. This is the ticket on which the suitcase was checked to Reno. This defendant further testifies that he had never known or communicated with the other defendant and that he had never possessed or trafficked in narcotics or engaged in any business concerning narcotics, and had never used the name F. T. Henry or known by that name, nor is there any proof that he was known by that name.

It is of importance to note that at no time has it been shown that either of the defendants had ever been in communication with each other nor is there one single word of testimony to show that there was a conspiracy or agreement to violate the Harrison Narcotic law. That taking the testimony of the Government as true and uncontradicted it shows at the most evidence of transportation of narcotics between a person known as F. T. Henry and one Gee Toy and no satisfactory evidence that either of the defendants was one of the persons connected with that transportation.

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#### **SPECIFICATIONS OF ERROR RELIED ON.**

In conformity with the provisions of subdivision 2 B rule 24 of this Court, we now set forth and specify separately and particularly, each error asserted and intended to be urged. The errors upon which we rely are as follows:

##### **1.**

The Court erred in denying the defendant's motion to quash the indictment on the ground that the indictment does not state facts sufficient to charge an offense against the laws of the United States. (Trans. pp. 58-59; p. 82.)

##### **2.**

The Court erred in overruling defendant's objection to the introduction of any testimony under the



indictment on the ground that the same did not state facts sufficient to charge an offense against the laws of the United States. (Trans. pp. 57-59.)

## 3.

That the trial Court erred in refusing to direct the jury to find a verdict of "not guilty" as to both defendants on the ground that no conspiracy had been proven. (Trans. pp. 80 and 107.)

## 4.

That the trial Court erred in granting the motion of the Government to consolidate indictment No. 11132 and indictment No. 11785, after the Government had rested its case in chief, and in making a *nunc pro tunc* order to that effect. (Trans. pp. 87 and 88.)

## 5.

That the trial Court erred in denying the motion to quash indictment No. 11785, or the consolidated indictment on the ground that the same does not state facts sufficient to charge an offense under the laws of the United States. (Trans. p. 89.)

## 6.

That the trial Court erred in instructing the jury as follows:

"In this case there are two indictments. These indictments, however, charge but a single offense and upon them you can render but a single verdict, of either guilty or not guilty.



That is to say, you are for the (87) purpose of your verdict, to consider the second indictment as a mere amendment or correction of the first." (Trans. pp. 107-108; exceptions taken, p. 115.)

## 7.

The trial Court erred in charging the jury as follows:

"You are instructed in the first place, that under the Act of Congress mentioned in this indictment, it is a crime to have in possession opium, morphine, or cocaine, unless the person so having in possession has registered and paid the prescribed tax. There is no claim or pretense here that either of these defendants has registered or paid the tax, and, therefore, the possession of these drugs by either of them would constitute a crime against the United States. It is not necessary for the Government to show failure to register or pay the tax if it shows possession. In this connection, I instruct you that if you find that either of the defendants had in his possession a baggage check entitling him or them to the possession of the suitcase containing any of these drugs, then the possession of such check with knowledge of the contents of the suitcase and intent to procure the suitcase is, in law, the possession of the drugs. But these defendants are not charged with having the drugs in their possession. They are charged with a conspiracy so to do." (Trans. p. 108; exception taken, p. 115.)

## 8.

That the trial Court erred in overruling and denying the plaintiffs in errors' motion in arrest

of judgment for the reason that the indictment or indictments failed to charge the defendants therein named with any crime against the United States, but, on the contrary, the indictment or indictments show affirmatively that the things which defendants are alleged to have done do not constitute any crime against the United States. (Pars. 1, 2, 3, 4, and 6, pp. 21-22 of Trans.)

## 9.

That the trial Court erred in overruling and denying the motion of plaintiffs in error, in arrest of judgment for the reason that the evidence does not prove or tend to prove that there ever was a conspiracy or agreement as alleged in the indictment. (Pars. 7, 8, 9, 10, 11, p. 24, Trans.)

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Argument.

**NEITHER INDICTMENT NO. 11132 NOR INDICTMENT  
NO. 11785 ARE SUFFICIENT AND ARE FATALLY  
DEFECTIVE.**

Under this point we will discuss specifications of errors Nos. 1, 2, 5, 6, and 8.

It will be noted that indictment No. 11132 merely charges that the defendants unlawfully conspired to commit the acts made offense by the so-called Harrison Narcotic Act and that at a certain time and place the defendants unlawfully conspired

“to unlawfully, willfully and feloniously have in their possession certain narcotic drugs,

which said narcotic drugs did not then and there bear and have affixed thereon appropriate tax paid stamps as required by the aforesaid Act of Congress.”

It will be noted that there was no allegation that the defendants were persons who were required to register and had failed to register. There can be no pretense by anyone that this indictment was sufficient for it was admitted by the Government that the indictment under which defendant was on trial was deficient.

(Trans. p. 85.) Mr. FINK (for the Government):

“Now here we have a situation where one indictment No. 11132 was returned and another indictment No. 11785 was returned to correct what we believed to be an error in the first one  
\* \* \* and I move that the two indictments be consolidated for trial—in other words that No. 11132 and No. 11785 be consolidated.”

As a matter of law indictment No. 11132 was fatally defective and insufficient as will be seen by reference to and comparison with indictment No. 11785.

Indictment No. 11785 differed from indictment No. 11132 in that in addition to the allegations contained in the first indictment it contained the allegation

“Said defendants then and there being persons required to register and pay a tax under the provisions of the act aforesaid as amended and said defendants not then and there having registered under the provisions of the said Act

and not then and there having paid the special tax provided for by the aforesaid Act on the said smoking opium, cocaine and morphine."

These identical words were set out in the overt act pleaded.

The question as to whether or not this indictment is sufficient is no longer an open one in this Circuit. In the case of *Gustave Johnson*, plaintiff in error, against the United States of America, defendant in error, case No. 4077, opinion by the Hon. Rudkin, Circuit Judge, opinion filed January 21, 1924, this Court held a similar indictment defective:

THE INDICTMENT IN THE JOHNSON CASE READS AS FOLLOWS:

"The indictment in this case charges that the defendants Johnson and Croxel violated the requirements of the Act of December 17, 1914, as amended by the Act of February 24, 1919, 'in that they did knowingly, wilfully, unlawfully and feloniously have in their possession a certain preparation and derivative of opium, to-wit: One can morphine and one finger stall containing approximately a total of 194 grains of morphine, said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid as amended, and said defendants not then and

INDICTMENT No. 11785 READS AS FOLLOWS:

"The defendants wilfully \* \* \* conspired, etc. \* \* \* to commit the acts made offense and crimes by the laws of the United States, to-wit, the Act of Congress of December 17, 1914, as amended February 24th, 1919, that is to say: The defendants did at the time and place aforesaid, knowingly, unlawfully, wilfully and feloniously conspire, combine, confederate and agree together, with, between and among themselves and with divers other persons to the grand jurors aforesaid, unknown, to unlawfully, wilfully and feloniously have in their possession certain narcotic drugs, to-wit, smoking opium, cocaine and morphine,



there having registered under the provisions of the said Act and not then and there having paid the special tax provided for by the aforesaid Act on the said morphine.' ”

said defendants then and there being persons required to register and pay a tax under the provisions of the Act aforesaid as amended, and said defendants not then and there having registered under the provisions of the said Act and not then and there having paid the special tax provided for by the aforesaid Act on the said smoking opium, cocaine and morphine.”

A comparison of the two indictments set out above side by side shows that they are identical word for word with each other with the exception that the indictment in the instant case has appropriate words charging a conspiracy. We will not at this time burden the Court with any citation of authorities on the proposition discussed in the Johnson case, *supra*, for the opinion in that case is the authority for the proposition that an indictment charging a defendant with possession of narcotics and that he was a person required to register and pay the tax and did not register and did not pay the tax does not state the facts sufficient to charge a crime against the United States.

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**THE ALLEGATIONS CHARGING A CONSPIRACY DO  
NOT MAKE THIS A VALID INDICTMENT.**

This precise question was under consideration in the case of the United States against Jin Fuey



Moy, 241 U. S. 394, 60 Law. Ed. at 1061, cited with approval by this Court in the case of Johnson against the United States, *supra*. In the Jin Fuey Moy case, Mr. Justice Holmes said:

“This is an indictment under section 8 of the act of December 17, 1914, chapter 1, 38 Stat. at L. 785, 789. It was quashed by the District Court on the grounds that the statute did not apply to the case. 225 Fed. 1003. The indictment charges a conspiracy with Willie Martin to have in Martin’s possession opium and salts thereof, to-wit, one dram of morphine sulphate. It alleges that Martin was not registered with the Collector of Internal Revenue of the District, and had not paid the special tax required. That the defendant, for the purpose of executing the conspiracy, issued to Martin a written prescription for the said morphine sulphate and that he did not issue it in good faith, but knew that the drug was not given for medicinal purposes, but for the purpose of supplying one addicted to the use of opium. The question is whether the possession conspired is within the prohibitions of the Act.”

And it was held that the complaint was insufficient.

“When the criminality of the conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose not

in itself criminal or unlawful, by criminal or unlawful means, the means must be set out."

Pettibone v. United States, 148 U. S. 197; 37

Law. Ed. 419;

United States v. Cruikshank, 92 U. S. 542; 23

Law. Ed. 588;

Fontana v. United States, 262 Fed. 283;

United States v. Robinson, 266 Fed. 240.

"Where the object to be attained is lawful, it is necessary to set out the means or state the character of the acts by which the design was to be accomplished as a component part of the offense, with such precision and certainty as to show that they were unlawful. So if means are alleged that may create a crime, although in themselves they fall outside of the legal definition of any, the means must be stated that the court may ascertain what crime, if any, they create.

It will not be sufficient to allege in general terms, however, strong, that the purpose to be affected was criminal or unlawful, nor that the means to be used, where their criminal or unlawful character is relied on, were malicious or fraudulent, or unlawful or criminal but those means must be stated in such terms that the court may see that they are unlawful at common law, or by virtue of some statute."

12 C. J. 623 and cases cited.

This Court having held in the Johnson case, that an allegation of "unlawful possession of narcotics", did not state an offense, it necessarily follows that the identical language when used after the words "unlawfully conspire" in an indictment do not ap-

praise the defendants of what crime, if any they have committed, inasmuch as there are 8 different ways to violate the Harrison Narcotic Act.

The insufficiency of the first indictment was raised:

(1) At the time the first witness was sworn by a motion to quash. (Trans. p. 57.)

(2) At the close of Government's case by motion for directed verdict. (Trans. pp. 79 to 81.)

(3) By motion to quash the indictment at close of Government's case. (Trans. pp. 82, 83.)

(4) By motion to quash the indictment at the conclusion of all the testimony. (Trans. p. 107.)

(5) By motion in arrest of judgment. (Trans. p. 116, et seq.)

All of the above motions were by the Court denied and proper exceptions taken thereto.

The insufficiency of the second indictment was raised

(1) By a motion to quash. (Trans. p. 89.)

(2) By a motion to quash at the conclusion of all the testimony. (Trans. p. 107.)

(3) By motion in arrest of judgment. (Trans. p. 117, et seq.)

All of which motions were by the Court denied and proper exception taken thereto.

### THE OBJECTIONS WERE TIMELY.

Where the indictment did not state facts sufficient to constitute an offense, defect was not one waived by failure to demur or move to quash the indictment prior to trial and objection might be made even after verdict.

Hardesty v. U. S., 168 Fed. 25, (C. C. A. 6);  
 Shilter v. U. S., 257 Fed. 724, (C. C. A. 9);  
 Cohn v. U. S., 258 Fed. 355, (C. C. A. 2);  
 U. S. v. Leach, 291 Fed. 788.

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**THE TRIAL COURT ERRED IN PERMITTING AN AMENDMENT TO THE INDICTMENT AND A CONSOLIDATION OF THE INDICTMENT UNDER WHICH THE DEFENDANTS WERE BROUGHT TO TRIAL WITH ANOTHER INDICTMENT AND IN MAKING ITS NUNC PRO TUNC <sup>order</sup> TO THAT EFFECT.**

Under this head we will discuss specifications of error 4 and 6.

U. S. R. S. 1024 provides

“when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class or crimes or offenses which may be properly joined instead of having several indictments the whole may be joined in one indictment on several counts; but if two or more indictments are found in such cases the Court may order them to be consolidated.”

A careful examination of all the cases recorded, wherein this statute has been construed, fails to dis-



close a single instance where the consolidation was ordered after the trial had been commenced; in all of them it was prior to trial.

The motion of the district attorney to consolidate for trial cases No. 11132 and No. 11785 (Trans. p. 85) was made after the Government had rested its case in chief and after motions to direct the jury for an instructed verdict and to quash the indictment had been made and renewed. The order of the Court is found on page 88 of the transcript; and is as follows:

“The motion to dismiss the indictment will be denied. The motion to consolidate the two indictments for trial and to proceed will be granted *nunc pro tunc* as of the beginning of the trial. It is true that the exact question has not been presented.”

To say the least, the procedure here invoked by the district attorney is not only novel but it is a most radical departure from the administration of criminal law as it has been followed from time immemorial.

Two propositions are involved:

1. The power to amend an indictment returned by a grand jury;
2. The power to amend an indictment after trial to conform to the proof and the making of a *nunc pro tunc* order as of the date of the beginning of the trial.



The mere statement of the propositions carries with it their refutation.

If this novel procedure could be grafted onto the law there would be nothing to prevent a district attorney finding his indictment defective after putting in his proof, reconvening a grand jury and procuring a new indictment, arraign the defendant and then proceed upon the consolidated indictment and by procuring a *nunc pro tunc* order, proceed with the trial on an entirely different charge than the first indictment contained. It is useless to attempt to cite the Court any authority as to the fallacy of any such procedure as it is "Hornbook" law that no such practice as "amending to conform to proof" exists in criminal cases. It may apply in the trial of civil causes.

The Court charged the jury (Trans. p. 107):

"In this case there are two indictments. These indictments, however, charge but a single offense and upon them you can render but a single verdict of either guilty or not guilty. That is to say, you are, for the purpose of your verdict, to consider the second indictment as a mere amendment or correction of the first."

To which due exception was taken by the defendant by exception to charge at page 115 of the transcript, assignments of error at page 44 of transcript.

Neterer, D. J., said in *United States v. Monday*, 211 Fed. 537:

“An indictment is a criminal charge returned under the solemnity of an oath by grand jury charging a person with a violation of law. There is no act of Congress authorizing amendments to an indictment. The fifth amendment to the Constitution provides that no person shall be prosecuted for an offense for an infamous crime except upon indictment.”

In *ex parte Bain*, 121 U. S. 1, held.

“The declaration of Article V of the Amendments to the Constitution, that ‘no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of the grand jury’ is jurisdictional; and no court of the United States has authority to try a prisoner without indictment or presentment in such cases.

The indictment here referred to is the presentation to the proper court, under oath, by a grand jury, duly impaneled, of a charge describing an offense against the law for which the party charged may be punished.

When this indictment is filed with the court, no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a resubmission of the case to the grand jury. And the fact that the court may deem the charge immaterial, as striking out of surplus words makes no difference. The instrument as thus changed is no longer the indictment of the grand jury which presented it.

This was the doctrine of the English courts under the common law. It is the uniform ruling of the American courts, except where statutes prescribe a different rule; and it is the imperative requirement of the provision of the Constitution above recited, which would be of little avail if an indictment once found can

be changed by the prosecuting officer, with consent of the court, to conform to their views of the necessity of the case.

Upon indictment so changed the court can proceed no farther. There is nothing (in the language of the Constitution) which the prisoner can 'be held to answer.' "

We will not burden the Court further with any citation of authorities on this point. The district attorney had conceded that his first indictment was defective and then asked leave to consolidate the first defective indictment with another defective indictment. We urge that two defective indictments either consolidated or one to be the amendment of the other can not make one good indictment.

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**THE EVIDENCE DOES NOT PROVE, NOR EVEN TEND TO PROVE, THAT THERE EVER WAS A CONSPIRACY. (Assignment of errors 3-7.)**

The trial Court instructed the jury:

"you are instructed in the first place that under the Act of Congress mentioned in this indictment, it is a crime to have in possession opium, morphine, or cocaine, unless the person so having in possession has registered and paid the prescribed tax. There is no claim or pretense here that either of these defendants has registered or paid the tax, and therefore the possession of these drugs by either of them would constitute a crime against the United States. It is not necessary for the Government to show failure to register or to pay the tax if it shows possession. In this connection,

I instruct you that if you find that either of the defendants had in his possession a baggage check entitling him or them to the possession of the suitcase containing any of these drugs, then the possession of such check with knowledge of the contents of the suitcase and intent to procure the suitcase is, in law, the possession of the drugs. But these defendants are not charged with having the drugs in their possession, they are charged with a conspiracy so to do.

You are instructed that a combination, agreement, and conspiracy, which has as its object the having of these drugs in possession without registering or paying a tax is a crime against the United States. That is to say it constitutes the crime of conspiracy."

A proper exception to this portion of the charge was taken at the conclusion of the charge (Trans. p. 115) in the presence of the jury. An almost identical charge to the jury was condemned by this Court in *Johnson v. the United States*, *supra*, and without further comment we would state that under all the authorities it is prejudicial, does not state the law and in and of itself would constitute reversible error.

Realizing the rule of this Court that it will not inquire into where the weight of the evidence lies and that the verdict of the jury will be upheld if there is any substantial testimony to support it, taking the evidence as a whole, there is not a scintilla of evidence to support a finding that either of these two defendants ever conspired with each



other or communicated with each other by word of mouth or otherwise in regard to the unlawful possession of narcotics. The only thing proved by the Government was that somebody in Oakland shipped a suitcase containing narcotics to someone in Reno, Nevada. It is elementary that a conspiracy cannot be proven by simply establishing an overt act, either lawful or criminal. In this case the overt act is a lawful one. Johnson case, *supra*.

"To establish a conspiracy to violate a certain criminal statute, the evidence must convince the jury that defendants did something other than participate in the substantive offense which is the object of the conspiracy. To illustrate, A, B and C may each have purchased this whiskey from D, E and F, and may have carried it from the freight car in which it arrived, yet not have been in the conspiracy to which D, E and F were parties."

U. S. v. Heitler, 274 Fed. 405.

Gilbert, C. J., in Peterson v. United States, 274 Fed. 930, said:

"The contention of the plaintiff in error that there was no evidence to prove a conspiracy must be sustained. In the bill of exceptions which is certified to contain all the evidence offered or admitted on the trial which in any manner concerns the plaintiff in error or relates to any of the exceptions or rulings of the court therein, there is testimony that altered stamps were found in the possession of the plaintiff in error, and that he pleaded guilty to an indictment which charged him with hav-



ing in his possession such altered stamps with the intention to sell and pass them. But there is no testimony or evidence of any kind to show that he conspired with his co-defendant (who was also found guilty) or with anyone to steal or alter such stamps, or that there was any concert of action between the plaintiff in error and any of the defendants, or that there was a conspiracy."

Applying the reasoning of the last case to the instant case: Assuming, without conceding, that either of the defendants had the possession of narcotics, there is no testimony or evidence of any kind to show that he conspired with his co-defendant or with anyone to possess narcotics (which would be no crime) or that there was any concert of action between plaintiff in error and any of the defendants or that there was a conspiracy.

In *Simpson v. United States*, 289 Fed. p. 191, Rudkin, C. J., in his dissenting opinion, says:

"The charge was a conspiracy to commit a crime, and there was no direct testimony to establish such charge. The conclusion of the majority seems to be based upon the erroneous assumption that a conspiracy to commit a crime must necessarily exist whenever two or more persons are in anywise implicated in its commission. But, if this be true, Section 332 of the Criminal Code (Compiled Stats. Sec. 10506), declaring, 'Whoever directly commits any act constituting an offense defined in any law of the United States or aids, abets, counsels, commands, induces, or procures its commission is the principal', is without legal significance."

Other cases holding evidence insufficient to establish a conspiracy:

Stager v. United States, 233 Fed. 510;

State v. Messner, 86 Pac. 636 (Wash.);

Farmer v. U. S., 223 Fed. p. 903, par. 3-4,  
p. 907.

Not one word of testimony in this case connecting up the one defendant with the other in the relation of co-conspirators. Surely, if there ever was a case in which the Government failed to prove a conspiracy, it is the instant one. To say that a conspiracy had been proven in this case, by simply showing that a shipment of narcotics had been made from one point to another, would mean that whenever two persons are concerned in a crime, that of necessity would prove a conspiracy.

Fortunately under our law it takes more than that to prove a conspiracy. A most casual reading of the record discloses that these defendants have been most grievously wronged. It is a case of mistake of the Government agents, too zealous to detect crime and in making a premature arrest, have laid the blame on innocent persons, one a young lad who had recently come to America and the other an employee in the railroad yards at Sparks, Nevada, and neither of these men had ever been known to or had the reputation for dealing in narcotics. It would have been a simple matter for the Government agents to have permitted the person to whom the letter and baggage check was addressed to claim

the suit case and then make the arrest. On this sort of flimsy testimony two men have been convicted of the crime of conspiracy by a jury. In these days of the narcotic evils, it is notorious that any person charged with a violation of those laws which tend to discourage the use of these insidious and health destroying enemies of humanity, has a scant chance for a fair trial at the hands of the average jury, because of their abhorrence of persons so charged.

“A judgment should not be reversed for mere technical error, but to condone such an error as this is subversive of the constitutional right of trial by jury.” (Rudkin, C. J., in *Simpson v. U. S.*, *supra*.)

In this case the record shrieks with error. These errors are prejudicial and anyone of them is sufficient to warrant this Court in setting aside the conviction and sentence.

In conclusion we repeat:

- (1) The 1st indictment is insufficient.
- (2) The 2nd indictment is insufficient.
- (3) The Court erred in permitting an amendment or consolidation.
- (4) The Court erred in its instructions to the jury.
- (5) There is no evidence that either of the defendants conspired to violate any law.

And for any and all of these grounds the judgment should be reversed.

Dated, San Francisco,  
February 11, 1924.

Respectfully submitted,

J. H. SAPIRO,

C. A. A. MCGEE,

*Attorneys for Plaintiff in Error,  
Gee Sue Tom.*

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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HON WON CHONG and GEE SUE TOM,  
*Plaintiffs in Error,*

VS.

UNITED STATES OF AMERICA,  
*Defendant in Error.*

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**BRIEF FOR PLAINTIFFS IN ERROR**

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ROY L. DAILY,  
*Attorney for Plaintiff in Error,*  
*Hon Won Chong.*

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FILED

FEB 13 1924

F. D. MONCKTON,





No. 4112.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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HON WON CHONG and GEE SUE TOM,  
*Plaintiffs in Error,*

VS.

UNITED STATES OF AMERICA,  
*Defendant in Error.*

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## BRIEF FOR PLAINTIFFS IN ERROR

### STATEMENT OF THE CASE.

On May 16, 1922, the plaintiffs in error were indicted by the Grand Jury of the United States, charging that Hon Won Chong and Gee Sue Tom on or about May 1st, 1922,

“at San Francisco in the Southern Division of the Northern District of California then and there being, did then and there \* \* \* conspire \* \* \* and agree together and with divers other persons unknown to the Grand Jurors \* \* \* to commit acts made offenses and crimes by the Laws of the United States, to-wit: the Act of Congress of December 17, 1914, as amended February 24, 1919, to unlawfully, wilfully and feloniously have *in their possession* certain narcotic drugs, \* \* \* not \* \* \* having paid the special tax provided \* \* \*.”

“That said conspiracy \* \* \* between the

said defendants and divers other persons \* \* \* was continuous \* \* \* from and after the first day of May, 1922 \* \* \* that in furtherance of said conspiracy \* \* \* and to effect and accomplish the object thereof, the said defendants, and each of them, did, on or about May 1st, 1922 at *San Francisco* \* \* \* unlawfully \* \* \* have in their possession certain derivative of coca leaves."

On July 6, 1922, plaintiffs in error were duly arraigned and pleaded "not guilty". Said case was continued to July 15, 1922, to be set for trial. (Tr. pp. 8-9.)

On October 11, 1922, plaintiffs in error were again arraigned and pleaded "not guilty" and the case was continued to October 28, 1922, to be set for trial. (Tr. p. 11.)

On March 22, 1923, the case came on regularly for trial. (Tr. p. 12.)

On March 23, 1923, the case came on regularly for further trial. (Tr. p. 14.) The Government thereupon rested their case. Attorneys for plaintiffs in error moved the court for instructed verdict of "not guilty" and motion was denied and exception entered. Attorneys for plaintiffs in error thereupon moved the court for an order quashing the indictment. (Tr. p. 14.)

On March 27, 1923, the case came on regularly for further trial. (Tr. p. 15.) Attorney for the Government made a motion requesting the Court to deny the motion to quash and requested an order *consolidating* case No. 11785 with case No. 11132, then on trial. The Court ordered the plaintiffs in

error motions to *dismiss* and *quash* indictment be denied and permitted the Government's motion to consolidate nunc pro tunc as of the commencement of trial. Attorneys for plaintiffs in error entered exceptions to the consolidation and again moved the Court for an order quashing and abating the consolidated indictments, and requested an instructed verdict for plaintiffs in error, which request was denied. Attorneys for plaintiffs in error entered a plea in bar under indictment No. 11132. (Tr. pp. 15-16.)

On March 28, 1923, the case came on regularly for further trial *under consolidated indictments* No. 11132 and No. 11785 and plaintiffs in error were found "guilty" on the consolidated indictments. Case was continued to April 7, 1923, for pronouncing of judgments. (Tr. pp. 17-18-19.)

On April 7, 1923, the case came on regularly for pronouncing of judgment and attorneys for plaintiffs in error presented a motion in arrest of judgment, which motion was denied and exception reserved; thereupon judgment was given upon said verdict whereby the plaintiffs in error were sentenced to be imprisoned for a period of two years in the United States Penitentiary at McNeil Island, State of Washington. Plaintiffs in error prosecute their writ of error herein to secure a reversal of said judgment. The witnesses on behalf of the Government gave testimony tending to show that on May 3, 1922, a special delivery letter was delivered to Gee Sue Tom, which letter contained a baggage check and key. The baggage check was presented to the Western Pacific baggage station at Reno, Nevada, and corresponded with

a baggage check attached to a suitcase which contained narcotics. (Tr. pp. 59-60-61.)

The postmark on the envelope showed "Stockton, May 2nd, 9.30 a. m., Calif.", and "Reno, Nevada, May 3rd, 7.00 a. m., 1922, rec'd." and was addressed to Gee Toy, c/o Chow Kee, 129 *First St.*, Reno, Nevada, and the return address was "From F. T. Henry, 1040 Stockton Street, S. F., Cal." (Tr. pp. 62-63.)

On May 9, 1922, narcotic inspector H. Haley prepared a FICTITIOUS registered letter addressed to F. T. Henry, 1040 Stockton Street, San Francisco, California.

H. S. Keyes, a former Internal Revenue Agent, dressed in the uniform of a mail carrier, went to Room 38, 1040 Stockton Street, San Francisco, about 10 a. m. on May 9, to deliver the FICTITIOUS letter, but on his first visit he did not find F. T. Henry. (Tr. p. 75.) Agent Keyes returned to Room 38, at 1040 Stockton Street, about 1:00 p. m. on the same day, and plaintiff in error, Hon Won Chong, identified himself to Keyes as F. T. Henry, and signed "a registry *return* card" (Government's Exhibit No. 8), after which Agent Keyes delivered to Hon Won Chong the FICTITIOUS registered letter, but which letter Hon Won Chong never attempted to open in Agent Keyes' presence. (Tr. pp. 75-76-77.)

Narcotic Inspector H. Haley assisted Agents Halstead and Keyes in searching the pockets of Hon Won Chong at the time of his arrest, and from a bunch of papers taken from his pocket they found a *railroad ticket* (Government's Exhibit No. 5) (Tr. pp. 65-76), which ticket was a Western Pacific Railroad ticket



from Oakland to Reno. The Government agents did not find anything else on the person of Hon Won Chong, bearing the name of F. T. Henry. (Tr. p. 78.) Inspector Haley searched room 38 at 1040 Stockton Street, *but found no narcotics*. (Tr. p. 67.)

J. H. McNichols, railroad baggage agent for the Western Pacific at Oakland, identified the *valuation slip* as the one which was presented by the passenger presenting the ticket and McNichols remembered that there were two Chinamen present at the time the suitcase was checked and he (personally) *saw* the Chinaman sign the VALUATION SLIP, who stood right in front of him, but McNichols COULD NOT IDENTIFY PLAINTIFF IN ERROR, HON WON CHONG, AS THE MAN WHO SIGNED THE VALUATION SLIP. (Tr. pp. 78-79.) McNichols presented the *valuation certificate* to one of the Chinamen who said he couldn't write, but after a conversation with the other Chinamen, he came forward and signed the valuation slip with the name F. T. Henry. (Tr. pp. 91-92.)

Plaintiffs in error introduced evidence tending to deny each and every incriminatory fact. The evidence introduced shows that plaintiff in error, Hon Won Chong, arrived in San Francisco from China about March 15, 1923. That he stayed in San Francisco about eleven or twelve days, and then went to Vallejo about March 25th or 26th, where he worked as a cook in a Chinese store. He returned to San Francisco about May 6th or 7th, and was not in San Francisco on May 1st, 2nd or 3rd. He never saw the plaintiff in error, Gee Sue Tom, before he met him in the

courtroom in San Francisco during September, 1923, nor had he ever signed the name F. T. Henry prior to May 9th. (Tr. pp. 93-94.) The letter (Government's Exhibit No. 6) was not in his handwriting. He had never been in Oakland or Reno, Nevada. The railroad ticket which was taken from his person was given to him by Fong Ting, who told him to keep the ticket and watch Fong Ting's room until he returned to the city, and instructed Hon Won Chong that if any mail came for F. T. Henry, that he was to sign for it and take care of the letter until Fong Ting returned. Hon Won Chong is a married man BUT HIS WIFE AND CHILDREN ARE IN CHINA, and were not at 1040 Stockton Street, San Francisco, California, on May 9th.

#### **Specifications of Errors Relied Upon.**

1. That the trial Court erred in refusing to grant the motion for a directed verdict on behalf of plaintiffs in error, which motion was first made at the conclusion of the Government's case and thereafter renewed when all the evidence was in.

2. That the Court erred in making, giving and rendering judgment against the defendants for the reason that said indictment does not state any crime or any offense against any law of the United States, and for the reasons taken and assigned by the defendants in their motion in arrest of judgment.

## I.

**That the Trial Court Erred in Refusing to Grant the Motion for a Directed Verdict on Behalf of Plaintiffs in Error, Which Motion Was First Made at the Conclusion of the Government's Case and Thereafter Renewed When All the Evidence Was in.**

1. That the evidence adduced fails to prove a conspiracy as charged in the indictment.

The evidence only shows that a special delivery ENVELOPE was addressed to Gee Toy, 129 *First* Street, Reno, Nevada, ostensibly from F. T. Henry, 1040 Stockton Street, San Francisco, California, to be delivered to Duck Suy, which letter had been mailed at Stockton, California, on May 2, 1922, and contained a letter addressed to Duck Sung, written by one Jak Hing, "Now, I forward by railroad express, one suitcase and kindly get it containing goods to value of \$1112.00 \* \* \* please send me a check for the above."

The evidence also shows that there was a suitcase checked at Oakland, California, on May 1, 1922, on Western Pacific Railroad Ticket No. 182646, on which apparently baggage check No. 409250 was issued, and which baggage check, the stub of which corresponded with the attached portion on a suitcase which Internal Revenue Inspector Haley procured at Reno, Nevada, on May 3, 1923. The suitcase obtained by Inspector Haley contained the narcotics referred to in the indictment.

At the time the suitcase was checked at Oakland, California, on May 1st, a VALUATION SLIP was signed by the Chinese who checked the suitcase, and

the said valuation slip was signed in the presence of the Western Pacific baggage agent by a Chinese who stood in front of the baggage agent, and which Chinese could not be identified as the plaintiff in error Hon Won Chong.

On May 9, 1922, a fictitious registered letter addressed to F. T. Henry, 1040 Stockton Street, San Francisco, California (Exhibit No. 4), from Chu Kee Co., Reno, Nevada, upon which appeared in Chinese characters "deliver this letter to Soo Hoo Yee Wai." This fictitious registered letter was prepared by the Government agents and Mr. Keyes delivered it to 1040 Stockton Street, San Francisco, California. When Mr. Keyes first called at 1040 Stockton Street at about 10.00 o'clock a. m. on May 9, 1922, he did not find F. T. Henry at home, BUT A WOMAN ANSWERED THE DOOR WHO SAID SHE WAS THE WIFE OF F. T. HENRY. Mr. Keyes returned to 1040 Stockton Street about 1.00 o'clock p. m. of the same afternoon and delivered the REGISTRY RECEIPT to a man, who Mr. Keyes said identified himself as F. T. Henry, and who signed the registry receipt in his, Mr. Keyes', presence. Hon Won Chong never attempted to open the letter, but was immediately placed under arrest by the inspector. After his arrest, they searched his person and found a bundle of papers which contained a railroad ticket (Exhibit No. 5), BUT THEY FOUND NO OTHER PAPERS OR DOCUMENTS BEARING THE NAME OF F. T. HENRY, NEITHER DID THEY FIND ANY NARCOTICS IN THE ROOM AT APART-



MENT 38, WHERE THE SAID HON WON CHONG WAS AT THE TIME HE SIGNED THE REGISTRY RECEIPT.

A conspiracy has been defined as:

“A combination of two or more persons, by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means.” (5 R. C. L. 1061.)

or as the Honorable Court defined it:

“An agreement or combination between two or more persons to do an unlawful act, or to do a lawful act by unlawful means.”

Now, the essential ingredients of the crime of conspiracy are:

“1. An object to be accomplished which must be (a) the commission of an offense against the United States.

2. A plan or scheme embodying means to accomplish the object.

3. An agreement or understanding between two or more persons whereby they become definitely committed to cooperate for the accomplishment of the object or the means embodied in the scheme, or by any effectual means.

4. An overt act by one or more of the conspirators to effect the object of the conspiracy, and,

5. Guilty intent present in the minds of the conspirators.” (*U. S. v. Newton*, 52 Fed. 275.)

Now, applying the evidence introduced by the Government to the ESSENTIALS to be met in



proving the charge of conspiracy, the Government did not prove a conspiracy as charged in the indictment.

1. The evidence tersely stated shows:

(a) That there was a special delivery "envelope" (not letter) addressed to a Gee Toy at Reno, Nevada, to be delivered to one Duck Suy, which envelope was mailed from Stockton, California (not San Francisco), on May 2, 1922, which envelope contained a letter addressed to "Duck Sung" written by one "Jak Hing."

(b) That there was a suitcase containing narcotics, checked at Oakland, California, for which a valuation certificate was signed in the handwriting of some unknown person on May 1, 1922, on Western Pacific Railroad ticket, for which a baggage check was issued and presented on the suitcase, which baggage check was taken from an envelope at Reno, Nevada, by Government officers.

(c) That a fictitious registered letter was prepared by Government officials, addressed in English to F. T. Henry, 1040 Stockton Street, San Francisco, supposedly from Chu Kee Co., Reno, Nevada, with the notation appearing on the envelope in Chinese "to be delivered to Soo Hoo Yee Wai."

(d) That the said fictitious letter was delivered to Hon Won Chong on May 9, 1922, after he had signed a "registry receipt" when he told the Government agent that he was F. T. Henry, and after Hon Won Chong was arrested, he was searched, and the Western Pacific Railroad ticket introduced in evidence by the Government, upon which it was claimed the suitcase was checked, was found in Hon Won Chong's pocket.

Analyzing the said facts, and applying them to

the ingredients necessary to prove the crime of conspiracy, alleged in the indictment, what develops?

Essential 1. The object to be accomplished—

“Unlawfully conspired to possess narcotic drugs non-taxpaid.”

There was not one iota of evidence introduced during the whole trial to show that Hon Won Chong or Gee Sue Tom ever possessed any narcotic drugs not bearing tax-paid stamps. The evidence introduced showed that Hon Won Chong had in his possession (a) railroad ticket, and (b) answered to the name of F. T. Henry. The evidence also shows that the person who signed the “valuation certificate” at Oakland, was an unidentified Chinese, whose handwriting was not the same, or similar to the handwriting of Hon Won Chong, who signed the “registry receipt” for the fictitious F. T. Henry letter prepared and delivered by the Government officials, which resulted in the arrest of Hon Won Chong.

There is a conflict of evidence as to whether Gee Sue Tom is Gee Toy or not. Gee Sue Tom is a registered voter in Reno, Nevada, under the name of “Tom Sue.” A registered letter was forcefully delivered to him by the Government officers WHICH LETTER HAD BEEN OPENED BY THE SAID OFFICIALS PRIOR TO DELIVERY TO HIM, which ENVELOPE contained the claimant’s portion of the baggage check corresponding with the baggage check on the suitcase procured by the Government officials (not by either of these defendants) from the Western Pacific Railroad station at Reno, Nevada.

No evidence of any kind was introduced to show that the above defendants, or either of them, ever possessed the narcotics contained in the suitcase, or that either of them ever *actually* possessed the claimant's portion of the "baggage check" which the Court said:

"possession of such check with knowledge of the contents of the suitcase, and an intent to procure the suitcase, is in law possession of the drugs."

At the best, the only possession which was proven, was "constructive" possession, and how can it be said that Gee Sue Tom had knowledge of the contents of the suitcase when he had never read the letter nor had had the suitcase in his possession, nor knew what was in the suitcase?

Essential 2. A plan or scheme embodying means to accomplish the object.

The evidence introduced by the Government shows that some unidentified person checked a suitcase from Oakland, California, to Reno, Nevada, which suitcase contained narcotic drugs, by an unidentified person who signed a "valuation certificate" at Oakland, California, which signature was not in the handwriting of either Hon Won Chong or Gee Sue Tom. That there was a registered letter mailed from Stockton, California (not San Francisco), on May 2, 1922, by some unidentified person which letter was received at the post office at Reno, Nevada, on May 3, 1922, and was taken to the police station "unopened" and was left with the "patrolman or desk sergeant" about 8.30 a. m. on May 3rd. The said registered letter was

then returned to the post office at Reno about 10.30 a. m. of the same date, when there was a sticker placed over the side of the envelope where it had been opened by the "Chief of Police" or "Government Agent." This registered letter was then taken to "129 East FRONT Street" instead of "129 East FIRST Street," where there is a store owned by one Gee Fook Sang, under the name of Chu Kee Co. This said Gee Fook Sang is a brother-in-law of Gee Sue Tom. Gee Sue Tom was in the store alone, when the special delivery letter was left with him by the messenger boy. No evidence was introduced to show that the letter was for him, or that he attempted to open the letter, because the Government agents were so close behind the special delivery letter boy that it was impossible for Gee Sue Tom to open the letter before he was arrested. MR. HALEY OPENED THE LETTER HIMSELF AND TOOK THE BAGGAGE CHECK OUT OF IT, AND WENT TO THE WESTERN PACIFIC DEPOT AT RENO, AND GOT THE SUITCASE.

There was no evidence introduced to show that either or both of the defendants "schemed" in any way or manner to ship the suitcase containing the alleged narcotics from Oakland, California, to Reno, Nevada, or that they schemed to accomplish the object of procuring the registered letter containing the claim check, but on the contrary, the evidence does show that the Government officers schemed to force the two defendants into accepting the "envelope addressed to Gee Toy from Stockton, California, containing a letter addressed to Duck Sung, enclosing a statement



amounting to \$1112.00, and requesting a check in payment thereof" which envelope contained directions to deliver the registered letter to Duck Suy. The evidence further shows that a fictitious registered letter was prepared and delivered by the Government officers at apartment 38, 1040 Stockton Street, San Francisco, California, on May 9, 1922, to Hon Won Chong for F. T. Henry in an envelope directing that the said letter be delivered to Soo Hoo Yee Wai.

Essential 3. An agreement or understanding between two or more persons, whereby they become definitely committed to cooperate for the accomplishment of the object of possessing narcotic drugs non-taxpaid.

There was no evidence introduced to show that Hon Won Chong or Gee Sue Tom ever entered into any understanding or agreement with each other, or with any other persons to POSSESS narcotic drugs unlawfully, but on the contrary, the evidence shows that Hon Won Chong came to the United States from China, and was landed on February 15, 1922, on the S. S. "Hoosier State" at the Immigration Station, Angel Island, and came to San Francisco on March 15, 1922. Then he went to Vallejo about March 25th and returned to San Francisco about May 7th.

The Government agents said that Hon Won Chong told them he had lived in Bakersfield. What connection having been in Bakersfield has to do with a checking of a suitcase in Oakland, California, or the mailing of a registered letter in Stockton, California, does not appear, and the only purpose which this evidence



could serve would be for the purpose of impeachment, but before a witness may be impeached, the proper foundation must first be laid by calling the witness' attention to the time and place where the statement was made, and if he answers the question in the negative then the said evidence can be introduced for impeachment purposes, but none of these requirements, however, were met.

The Court said in *The Charles Morgan v. Kouns*, 115 U. S. 69, that:

"The rule is, that the contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it. *Conrad v. Griffey*, 16 Howard 46."

Gee Sue Tom was last in San Francisco about the month of September, 1921. There was no evidence introduced at any time on the part of the Government to show that these two defendants or anyone else had ever been in communication with each other directly or indirectly, or that they had ever become definitely committed to cooperate to accomplish the object of the conspiracy charged in the indictment No. 11132.

Essential 4. An overt act by one or more of the conspirators to effect the object of the conspiracy.

The overt act charged in the indictment alleges that in furtherance of said conspiracy, the said defendants,

and each of them, did, on or about May 1, 1922, at San Francisco, unlawfully and wilfully POSSESS certain narcotic drugs which were non-taxpaid. There was not a scintilla of evidence introduced which showed that either or both of the defendants were in San Francisco on May 1, 1923, or that both or either of the defendants conspired with divers other persons who were in San Francisco on that date or any date to POSSESS any drugs. There was no overt act charged in the indictment of possessing a baggage check at Reno, Nevada, on May 3, 1922, or of receiving a fictitious registered letter addressed to one F. T. Henry in San Francisco, on May 9, 1922; in fact, there is no proof whatsoever of any overt act, let alone proving THAT THE DEFENDANTS UNLAWFULLY POSSESSED NARCOTIC DRUGS AT SAN FRANCISCO ON MAY 1ST. By stretching the imagination to the utmost degree, the only thing proven by the evidence of any overt act was:

(a) The checking of a suitcase at Oakland, California, on May 2, 1922, by an unknown person who signed a valuation certificate, F. T. Henry, NOT IN THE HANDWRITING OF EITHER OF THE TWO DEFENDANTS.

(b) The mailing of a registered letter from Stockton, California, on May 2, 1922, by some unknown person.

(c) The delivery of an OPENED registered letter at a store where Gee Sue Tom happened to be at the time the Government officers had the letter delivered at the WRONG ADDRESS, in Reno, Nevada.

(d) The finding of a railroad ticket sold at Oakland, California, on May 1, 1922, which had

not been used up to and including May 9, 1922, on the person of Hon Won Chong, and the searching of the persons and places of, and where each of the defendants were at the time they were arrested, and not finding any non-taxpaid narcotic drugs, and

(e) Securing a statement from Hon Won Chong that he had been in Bakersfield, California..

Essential 5. Guilty intent present in the minds of the conspirators.

There was no evidence introduced either circumstantial or direct, whereby any intent, let alone guilty intent, was shown to have been present in the minds of either of these defendants. In fine, the evidence is absolutely conclusive that the defendants had never seen each other, had never communicated with each other, or with any person known by them, nor had they ever been in the same State at the same time with each other. The evidence actually shows that Hon Won Chong was not in San Francisco on May 1st, 2nd, 3rd, 4th or 5th, but that he was in Vallejo, California, until May 9th; that some person other than Hon Won Chong checked the suitcase at Oakland, California, on May 2, 1922, and signed a valuation slip which valuation slip contained the signature of F. T. Henry, AND WAS NOT IN THE SAME HANDWRITING AS APPEARS ON THE REGISTRY RECEIPT, SIGNED BY HON WON CHONG FOR F. T. HENRY, IN THE PRESENCE OF GOVERNMENT WITNESSES.

That the letter delivered by the Government officials to Gee Sue Tom at Reno, Nevada, was mailed

at Stockton, California, on May 2, 1922, and that the baggage check was never ACTUALLY in the possession of either of these defendants but was only constructively in the possession of Gee Sue Tom for a very few moments when it was taken from the envelope by a Government officer.

GUILTY INTENT is a necessary element of the crime of conspiracy. Ordinarily, of course, the intent will be inferred from the nature of the combination, but in this case there was no evidence introduced throughout the whole trial to show a combination of any kind, either by circumstantial or inferential evidence, nor was any evidence introduced to show that either of these two defendants had combined with divers other persons unknown to the other. As a necessary or usual consequence, an inference is irresistible from evidence introduced to show a combination of some kind to commit a conspiracy. The actual criminal or wrongful purpose must accompany the agreement, and if that is absent, the crime of conspiracy has not been committed, but there must always be an agreement proven by at least SOME evidence.

2. That the evidence fails to prove that the defendants Gee Sue Tom or Hon Won Chong were at any time connected with the, or any conspiracy, as charged in the indictment.

The only connection of Gee Sue Tom with the attempted conspiracy was that he was the recipient of a registered envelope mailed from Stockton, California, to Gee Toy, Reno, Nevada, which envelope contained the passenger portion of a baggage check No. 409250



which corresponded with the other portion of a baggage check attached to a suitcase procured at the Western Pacific baggage room by the Government officers (not Gee Sue Tom) which suitcase contained non-taxpaid narcotic drugs. The baggage check was never ACTUALLY in the possession of Gee Sue Tom, but was only CONSTRUCTIVELY so, for the brief period of a few seconds. The indictment charges UNLAWFUL POSSESSION of narcotic drugs at San Francisco, on or about May 1, 1922. The evidence does not show conspiracy to possess narcotic drugs at San Francisco, but only shows TRANSPORTATION to RENO, not POSSESSION at RENO. The envelope was addressed to Gee Toy, 129 FIRST Street and not 129 FRONT Street; because 129 First Street was a residential district, is no reason why there could not have been a Gee Toy residing there.

The evidence also showed that Gee Toy was not the owner of the Chu Kee Co., but the store was owned by Gee Fox Song, Gee Sue Tom's brother-in-law, who had at one time served a jail sentence. Gee Sue Tom had not been in San Francisco since September, 1921, while Hon Won Chong only came from China to San Francisco on March 15, 1922. There was no evidence introduced at all, showing that these two defendants had ever communicated with each other in any manner. No letters, telegrams, telephone messages, or other writings were shown to have been in either of their handwritings.

The only connection of Hon Won Chong with a conspiracy attempted to be proven by the Govern-



ment was that he received a fictitious registered letter addressed to F. T. Henry, 38 Stockton Street, San Francisco, California, and that by his having in his possession a railroad ticket, which had expired, and which was supposed to be the ticket upon which the suitcase, containing the narcotics, was checked from Oakland to Reno, connected him definitely with the unlawful POSSESSION of narcotics, non-taxpaid at San Francisco on May 1, 1922; while as a fact, the evidence introduced can only be construed as meaning that there was an unlawful transportation; therefore, there is a fatal variance between the allegation in the indictment and the evidence introduced.

3. That the evidence does not tend to prove that the defendants Gee Sue Tom or Hon Won Chong were guilty in the manner and form as charged in the indictment, or at all.

The indictment charges a conspiracy to unlawfully POSSESS narcotic drugs at San Francisco on May 1, 1922. The evidence introduced shows that some unknown and unidentified parties checked a suitcase from Oakland, California, on May 1, 1922, to Reno, Nevada, which suitcase had never been claimed by anyone but was taken into custody by the Government officers before the claimant or owner of the suitcase appeared. That a registered letter was delivered to a WRONG address, and that Gee Sue Tom was immediately arrested after the delivery of the registered letter, and before he had had an opportunity to open the said letter. The Court's instructions that

“possession of a baggage check entitling him to the possession of a suitcase containing drugs with

knowledge of the contents, and intent to procure the suitcase is in law POSSESSION OF THE DRUGS,"

would, if anything, only show unlawful possession CONSTRUCTIVELY and not ACTUALLY, and the possession would be at Reno, Nevada, and not San Francisco, California, as is alleged and charged in the indictment; therefore the evidence showed, if it showed anything, only unlawful *transportation* and there could have been no possession until after the baggage had been procured by producing the check at the railway station, and receiving the suitcase. We have here a variance which is fatal.

A few extracts from the opinions of the Courts will suffice to show the rule of law on this point.

"At the close of the plaintiff's (Government) case, move the court to instruct the jury that the evidence introduced \* \* \* is not sufficient to warrant the jury in finding a verdict in his favor; and it is held that such a motion is not one addressed to the discretion of the court, BUT THAT IT PRESENTS A QUESTION OF LAW, and that it is as much the subject of exceptions as any other ruling of the court in the course of the trial."

*Mercantile Ins. Co. v. Folsom*, 18 Wall. 250;  
*Schuchardt v. Allen*, 1 Wall, 370;  
*Bliven v. N. Eng. Screw Co.*, 23 Howard 362.

In *Hickman v. Jones*, 9 Wall. 201, the Court said:

"Where there is no evidence, or such a defect in it that the law will not permit a verdict for the plaintiff to be given, such an instruction may be properly demanded, and it is the duty of the court to give it. To refuse is error."

In *King v. Delaware Insurance Co.*, 6 Cranch 71, the Court said:

"An improper direction of verdict, or a refusal thereof is reversible error. THE QUESTION OF WHETHER OR NOT THE COURT ERRED IN REFUSING TO DIRECT A VERDICT IS A QUESTION OF LAW, not facts \* \* \* the case then is open to examination on its real merits."

In *Parsons v. Bedford*, 3 Peter 433, the Court said:

"The party may bring the facts into review, before the Appellate Court, so far as they bear upon questions of law by a bill of exceptions."

In *Suidam v. Wilson*, 20 Howard 427, the Court said:

"Where the record contains a bill of exceptions the operation of a writ of error is not confined to that portion of the record. If error is apparent from any part of the record, it is open to review, whether it is found in the bill of exceptions or elsewhere."

In *Lancaster v. Collins*, 115 U. S. 222, 225, the Court said:

"The court cannot review the WEIGHT of the evidence, but can look into it to see whether it was error in not directing the verdict for the plaintiff on the QUESTION OF VARIANCE, OR BECAUSE THERE WAS NO EVIDENCE TO SUSTAIN THE VERDICT."

In *Hepburn v. Du Bois*, 12 Peters 345, the Court said:

"Plaintiff in error has a right to demand of a court of review that they look at the evidence for only one purpose; to ascertain whether it was

sufficient in law to authorize the jury to find the facts which made out the right of the party on a part or whole of the case."

It is earnestly urged that the trial Court committed manifest error in refusing to grant the motion for a directed verdict on behalf of plaintiffs in error, which motion was made at the conclusion of the Government's case in chief, thereafter renewed when all the evidence was in, and again renewed after the order of consolidation was permitted.

The above assignments of error, in this respect, involve a consideration of all the evidence in the case included in the bill of exceptions, as to whether the plaintiffs in error have been sufficiently connected with the conspiracy set out in the indictment, and sufficient proof, in law, was introduced by the Government to uphold the verdict and judgment rendered against them.

## II.

**That the Court Erred in Making, Giving and Rendering Judgment Against the Defendants for the Reason That Said Indictment Does Not State Any Crime or Any Offense Against Any Law of the United States, and for the Reasons Taken and Assigned by the Defendants in Their Motion in Arrest of Judgment.**

### ARGUMENT.

NO CRIME IS SET FORTH IN THE INDICTMENT.

The indictment does not state facts sufficient in law to constitute a crime or public offense against the United States. This point is raised by the demurrer *ore tenus* interposed by the plaintiffs in error, on file



in the cause, which was ordered overruled and to which an assignment of error was duly made. (Tr. p. 33.) It is raised by plaintiffs in error's request for motion for a directed verdict of not guilty, made at the conclusion of the Government's case, and thereafter renewed when all the evidence was in. (Tr. pp. 35, 37, 41, 43.) It was also made by plaintiffs in error before judgment by their motion in arrest of judgment, to which an assignment of error was also made. (Tr. pp. 45 and 49.)

The indictment, or indictments, contain but one count, and they are defective for the reason that they fail to show that plaintiffs in error are one of the class required by Section 1 of the Act specified in the indictments, to register and pay a tax. The first clause of Section 1 of the Act of Congress of February 24, 1919, as also the Act of December 17, 1914, is as follows:

"That on or before July 1st of each year, every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the Collector of Internal Revenue of the district his name or style, place of business and place or places where such business is to be carried on, and pay the special taxes hereinafter provided:"

Barnes Fed. Code (Suppl. 1921), p. 174;  
Barnes Fed. Code (1919), pp. 1328 et seq.;  
Secs. 1-38, U. S. Statutes at Large, p. 785.

Section 1 of the Act of December 17, 1914, is designated as Section 5452 of Barnes' Federal Code; Section 8 as 5459, and Section 9 as 5460. The Act of



February 24, 1919, amended Sections 5452 and 5457, as set forth in said Code, which are Sections 1 and 6 of 38 United States Statutes at Large, but left Sections 5459 and 5460 undisturbed. In other words, Sections 8 and 9 of the "Harrison Anti-Narcotic Act," as amended, are the original sections of the Act of December 17, 1914. There are additional requirements in Section 1 of the Act, as amended, new crimes set forth, for which the same penalty set forth in Section 9 of the Act of December 17, 1914, is prescribed, but in other respects Section 1 in the Act, as amended, is not materially different from the original Act.

The indictment, or indictments, does not allege that the plaintiffs in error are importers, manufacturers, producers, compounders, sellers, dealers in, dispensers or givers away of opium or coca leaves or any compound, manufacture, salt, derivative or preparation thereof, BUT INDULGES IN THE BALD CONCLUSION OF LAW THAT THEY ARE PERSONS REQUIRED TO REGISTER AND PAY A TAX.

It has been held that Section 8 of the original "Harrison Anti-Narcotic Act" applies only to those persons specified in the first clause of the first section of said Act, and it has also been held that Section 8 of the Act, as amended, applies only to the same class.

*United States v. Jin Fuey Moy*, 241 U. S. 394 to 402;  
*Pendleton v. U. S.*, 290 Fed. 388;  
*Advance Sheets*, Vol. 290, Fed. No. 2, p. 388,  
 Sept. 20, 1923.

According to these authorities, plaintiffs in error are not within the provisions of Section 8 of the Act because they were merely, actually or constructively, in possession of the narcotics and had not registered and paid the special tax, *by adding the conclusion of law that they were required to register.* The Sixth Amendment to the United States Constitution provides:

“In all criminal prosecutions the accused shall enjoy the right to be informed of the nature and the cause of the accusation.”

To say that they were persons required to register did not inform them of the nature and the cause of the accusation.

Plaintiffs in error were entitled to know from the indictment, or indictments, whether they were accused as importers, manufacturers, producers, compounders, sellers, dealers in, dispensers or givers away of the narcotics mentioned in the indictment in order to prepare their defense and to save them from possible double jeopardy. This information was denied the defendants and we respectfully submit that the lower Court erred in so doing.

The indictment, or indictments, should have particularly designated to which one of the classes of those required to register they belonged. The conclusion of law that they were such persons required to register is too vague and uncertain and as such it is insufficient.

*U. S. v. Cruikshank*, 92 U. S. 542;  
*U. S. v. Carll*, 105 U. S. 611.

It follows, therefore, that upon the authority of the rulings in the cases of *Jin Fuey Moy*, 241 U. S. 394, *Pendleton v. U. S.*, 290 Fed. 388; *U. S. v. Wilson*, 225 Fed. 82, that the indictment, and the consolidated indictments, against the plaintiffs in error charges no crime at all, and from the rulings in *U. S. v. Hess*, 124 U. S. 483; *U. S. v. Carll*, 105 U. S. 611, *U. S. v. Simmons*, 96 U. S. 360, *Dowling v. U. S.*, 278 Fed. 633, and the other cases cited, that the plaintiffs in error cannot be charged with other offenses by inference or intendment, when such offenses are not pleaded with such precision as to inform the plaintiffs in error of the nature of the charge against them so that they may be protected in their rights; and the lower Court committed reversible error in overruling the demurrer, *ore tenus*, in denying their motion for a directed verdict, and in denying their motion in arrest of judgment and in sentencing them to prison.

The rule of law laid down in the *Jin Fuey Moy* case, 241 U. S. 394, has been upheld by this Court in the recent decision of *Gustave Johnson v. U. S.*, No. 4077, unreported, but filed January 21, 1924.

It is contended, on behalf of the plaintiffs in error, that, under these assignments of error, the judgment of conviction should be reversed upon three grounds:

(1) That the ESSENTIALS of the crime of conspiracy were not proven, and

(2) There is a fatal variance between the allegation of unlawful POSSESSION and the proof of unlawful TRANSPORTATION, and

(3) There is no crime set forth in indictment 11132, or consolidated indictments 11785 and 11132.

## CONCLUSION.

From the foregoing it will be seen that there was no evidence introduced by the Government sufficient to warrant the case going to a jury, and a QUESTION OF LAW is presented to this Court in applying the facts to the ESSENTIALS OF THE CRIME OF CONSPIRACY. As the ESSENTIALS have not been met by the evidence introduced by the Government; and as the indictments do not state facts sufficient in law to constitute a crime or public offense against the United States, it is urged that the judgment should be reversed.

Respectfully submitted,

ROY L. DAILY,  
*Attorney for Plaintiff in Error,*  
*Hon Won Chong.*

San Francisco, Cal., February 8, 1924.

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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YEP GAN and LEE HON MIN,  
Appellants,

vs.

JOHN D. NAGLE, as Commissioner of Immigration  
at the Port of San Francisco, California,  
Appellee.

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Transcript of Record.

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Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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YEP GAN and LEE HON MIN,  
Appellants,  
vs.

JOHN D. NAGLE, as Commissioner of Immigration  
at the Port of San Francisco, California,  
Appellee.

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**Transcript of Record.**

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Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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### **Names of Attorneys of Record.**

For Petitioner and Appellant:

JOHN L. McNAB, Esq., S. C. WRIGHT, Esq.,  
and BYRON COLEMAN, Esq., San Francisco, Cal.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Francisco, Cal.

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,922.

In the Matter of the Application for Writ of Habeas Corpus on Behalf of YEP GAN.

### **Praeceptum for Transcript of Record.**

To the Clerk of the Above-entitled Court:

Sir:

Please issue certified copies of the following proceedings, etc.:

1. Petition for writ of habeas corpus.
2. Order to show cause therein.
3. Demurrer.
4. Order sustaining demurrer, denying petition and discharging order to show cause.
5. Notice of appeal.
6. Petition for appeal.
7. Order allowing appeal.

8. Assignment of errors.
9. Stipulation and order as to exhibits.
10. Praeceptum for appeal and all minute orders of Court, except those of postponement.
11. Citation on appeal.

Sept. 14, 1923.

JOHN L. McNAB,  
S. C. WRIGHT,  
BYRON COLEMAN,

Attorneys for Petitioner and Detained, the Appellant.

Receipt of a copy of the within praecipe for transcript of record is hereby admitted this 14th day of September, 1923.

JOHN T. WILLIAMS,  
United States Attorney.

[Endorsed]: Filed Sep. 14, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[1\*]

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In the District Court of the United States in and for the Northern District of California, First Division.

No. (17,922).

In the Matter of the Application for Writ of Habeas Corpus on Behalf of YEP GAN.

**Petition for Writ of Habeas Corpus.**

Your petitioner, Lee Hon Min, being duly sworn, on oath deposes and says:

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\*Page-number appearing at foot of page of original certified Transcript of Record.

That he is the next friend of Yep Gan, and makes this petition on behalf of said Yep Gan. That said Yep Gan is unlawfully imprisoned and restrained of his liberty by John D. Nagle, Commissioner of Immigration in the city and county of San Francisco, in said district, under and by virtue of a warrant of deportation heretofore issued by the Secretary of Labor of the United States. That petitioner is unable to attach a copy of said warrant of deportation for the reason that petitioner is informed that the record in the case of said Yep Gan is in Washington, D. C., and is not in the possession of said Commissioner of Immigration in the city and county of San Francisco.

That petitioner has nevertheless ordered a copy of said warrant and all other papers in said record and will immediately on receipt thereof file the same in this court.

That said imprisonment and restraining of the liberty of the said Yep Gan is unlawful in this:

I. That said Secretary of Labor of the United States has no jurisdiction over the person of said Yep Gan and no authority or jurisdiction to issue said warrant.

II. That said Secretary of Labor exceeded his jurisdiction an authority in issuing said warrant of deportation.

III. That said warrant of deportation is void in this: That it appears from the record in said case that said Yep Gan [2] is the son of a native-born Chinese, a citizen of the United States, and is there-

fore, himself a citizen of the United States, and not subject to deportation by said Secretary of Labor.

IV. That said Yep Gan was not given a fair and impartial trial and hearing by the said Immigration officials of the United States prior to the issuing of said warrant of deportation and upon which said warrant is purported to be based, all of which will more fully appear by the record of the testimony and the proceedings given and adduced at said hearing, which said record has been ordered by your petitioner and will be filed in this proceeding, that among other reasons why your petitioner was not given a fair and impartial trial and hearing in said matter, your petitioner alleges as follows: That there was no evidence adduced at said hearing to prove that said Yep Gan was other than the son of a native-born Chinese citizen of the United States, yet said immigration officials refuse to accept the testimony of the father of said Yep Gan as evidence of the birth of his son.

V. That said Yep Gan is a citizen of the United States and belongs to the class of persons exempt from the jurisdiction and authority of said Secretary of Labor, and said Yep Gan asserts that he has the right to remain in the United States at the present time.

Your petitioner alleges that the Commissioner of Immigration in San Francisco intends to deport said Yep Gan to China by steamer "President Taft" sailing June 28th, 1923, and there is, therefore not sufficient time to procure the record before that date.

WHEREFORE, your petitioner prays that a writ of habeas corpus be issued directed to said John D. Nagle, Commissioner of Immigration at San Francisco, California, in order that the cause of detention of said Yep Gan may be inquired into and that in the meantime the deportation of said Yep Gan be stayed.

JOHN L. McNAB,  
BYRON COLEMAN,  
TIMOTHY HEALY,  
Attorneys for Petitioner. [3]

State of California,  
City and County of San Francisco,  
Northern District of California,—ss.

Lee Hon Min, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge and belief, except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

LEE HON MIN.

Subscribed and sworn to before me this 28th day of June, 1923.

[Seal] W. W. HEALEY,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Jun. 28, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.



In the District Court of the United States in and for the Northern District of California, First Division.

No. 17,922.

In the Matter of the Application for Writ of Habeas Corpus on Behalf of YEP GAN.

**Order to Show Cause.**

Upon consideration of the petition filed in the above-entitled cause, it is ordered that the respondent, the Commissioner of Immigration at the port of San Francisco, show cause in this court, in the courtroom thereof in the city and county of San Francisco, at 10 o'clock A. M. on the 2d day of July, 1923, why the writ of habeas corpus should not issue as prayed for by the petitioner herein.

Let a copy of this order be served forthwith upon said respondent and upon the United States Attorney for this district, and it is

FURTHER ORDERED that deportation of said Yep Gan be and the same is hereby stayed until further order of this Court.

Dated: July 28th, 1923.

M. T. DOOLING,  
Judge of the District Court.

[Endorsed]: Filed Jun. 28, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.  
[5]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 17,922.

In the Matter of YEP GAN on Habeas Corpus.

**Demurrer to Petition for Writ of Habeas Corpus.**

Comes now the respondent, John D. Nagle, Commissioner of Immigration, at the port of San Francisco in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JOHN T. WILLIAMS,  
United States Attorney,  
ALMA M. MYERS,  
Asst. U. S. Attorney,  
Attorneys for Respondent.

[Endorsed]: Filed Aug. 20, 1923. Walter B. Maling, Clerk. [6]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 20th day of August, in the year of our Lord, one thousand nine hundred and twenty-three. Present: the Honorable WM. C. VAN FLEET, District Judge.

No. 17,922.

In the Matter of YEP GAN on Habeas Corpus.

**Minutes of Court—August 20, 1923—Order Sustaining Demurrer and Denying Writ of Habeas Corpus.**

This matter came on regularly this day for hearing on order to show cause as to issuance of a writ of habeas corpus. John L. McNab, Esq., was present for and on behalf of petitioner and detained. Miss Alma M. Meyers, Asst. U. S. Atty., was present for and on behalf of respondent, and filed demurrer to petition, and all parties consenting thereto, it is ordered that the Immigration Records be filed as Respondent's Exhibits "A," "B," "C" and "D" and that the same be considered as part of original petition. After argument by the respective attorneys, the Court ordered said matter be and the same is hereby submitted. After due consideration had thereon, the Court ordered that said demurrer to petition for writ of habeas corpus

be and the same is hereby sustained, the petition for writ of habeas corpus denied and order to show cause discharged. [7]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,922.

In the Matter of the Application for Writ of Habeas Corpus on Behalf of YEP GAN.

**Notice of Appeal.**

To the Clerk of the Above-entitled Court and the Honorable John T. Williams, U. S. Attorney for the Northern District of California:

You and each of you will please take notice that Yep Gan, the detained person herein by Lee Hon Min, the petitioner herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order made and entered herein on the 20th day of August, 1923, by the Honorable William M. Van Fleet, Judge of the above-entitled court, sustaining the demurrer to the petition for writ of habeas corpus filed herein on behalf of the said Yep Gan; discharging the order to show cause and denying the petition for writ of habeas corpus on behalf of the said Yep Gan.

Dated, San Francisco, California, August 22, 1923.

JOHN L. McNAB,  
S. C. WRIGHT,  
BYRON COLEMAN,

Attorneys for Petitioner and Detained, the Appellant.

Copy of the within is hereby admitted this 23d day of August, 1923.

JOHN T. WILLIAMS,  
United States District Attorney.

[Endorsed]: Filed Aug. 23, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[8]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,922.

In the Matter of the Application for Writ of Habeas Corpus on Behalf of YEP GAN.

**Petition for Appeal.**

Now comes Yep Gan, the detained, by Lee Hon Min, the petitioner and the appellants herein and say:

That on the 20th day of August, 1923, the above-entitled Court made and entered its order denying the petition for writ of habeas corpus prayed for and filed in the above-entitled matter; sustained a demurrer to said petition and discharged an order to show cause why said petition should not be



granted. The Court in said order made certain errors to the prejudice of the appellants herein, all of which will more fully appear from the assignment of errors filed herein.

WHEREFORE these appellants pray that an appeal may be granted on behalf of the United States Circuit Court of Appeals of the Ninth Circuit for the correction of the errors complained of, and further that the transcript of the record and proceedings and papers in the above-entitled matter, as shown by the praecipe, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit under the rules of said Court and in accordance with the law in such cases made and provided; that all further proceedings in this matter be stayed until a final determination of said appeal.

Dated San Francisco, California, August 22, 1923.

J. L. McNAB,

S. C. WRIGHT,

BYRON COLEMAN,

Attorneys for Petitioner and Detained, Appellants.

[9]

Copy of the within is hereby admitted this 23d day of August, 1923.

JOHN T. WILLIAMS,

United States District Attorney.

[Endorsed]: Filed Aug. 23, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[10]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,922.

In the Matter of the Application for Writ of Habeas Corpus on Behalf of YEP GAN.

**Assignment of Errors.**

Now comes Yep Gan, the detained person herein by Lee Hon Min, the petitioner herein, both of whom are appellants through their attorney John L. McNab, and specifies the following as the errors upon which they will rely and will urge upon this appeal:

I. That the Court erred in denying a petition for writ of habeas corpus.

II. That the court erred in sustaining the demurrer of the United States to said petition for writ of habeas corpus.

III. That the Court erred in discharging the order to show cause why a writ of habeas corpus should not issue.

IV. That the Court erred in holding that the Commissioner of Immigration and the Secretary of Labor granted the said Yep Gan a fair hearing, and that he was not excluded from the United States without due process of law.

V. That the Court erred in sustaining the finding and decision of the Commissioner of Immigration and the United States Department of Labor that the said Yep Gan was not a native-born citizen of the

United States and entitled to enter, be and remain in the United States of America.

WHEREFORE, because of manifest errors committed by the said Court, the appellants through their attorney pray that the said order and judgment sustaining the demurrer to petition for writ of habeas corpus, discharging the order to show cause, and denying the writ of habeas corpus in the above-entitled matter [11] be reversed, and for such other and further relief as the Court may deem proper.

Dated August 22, 1923.

JOHN L. McNAB,  
S. C. WRIGHT,  
BYRON COLEMAN,  
Attorneys for Appellants.

Copy of the within is hereby admitted this 23d day of August, 1923.

JOHN T. WILLIAMS,  
United States District Attorney.

[Endorsed]: Filed Aug. 23, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[12]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,922.

In the Matter of the Application for Writ of Habeas Corpus on Behalf of YEP GAN.

**Order Allowing Appeal.**

On motion of John L. McNab, one of the attorneys for Lee Hon Min, petitioner in the above-entitled matter and for Yep Gan, the detained:

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order and judgment heretofore made and entered herein sustaining the demurrer to the petition for writ of habeas corpus herein, discharging the order to show cause and denying the petition for writ of habeas corpus, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in the manner and form prescribed by law, and that meanwhile all further proceedings in this Court and by the immigration authorities be suspended and superseded until the determination of said appeal.

IT IS FURTHER ORDERED that the said Yep Gan remain in his present custody pending the hearing and final determination of said appeal.

Dated August 23d, 1923.

WM. C. VAN FLEET,  
Judge of the United States District Court, Northern  
District of California. [13]

Copy of the within is hereby admitted this 23d  
day of August, 1923.

JOHN T. WILLIAMS,  
United States District Attorney.

[Endorsed]: Filed Aug. 23, 1923. Walter B.  
Maling, Clerk. By T. L. Baldwin, Deputy Clerk.  
[14]

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In the Southern Division of the United States Dis-  
trict Court for the Northern District of Cali-  
fornia, First Division.

No. 17,922.

In the Matter of the Application for Writ of  
Habeas Corpus on Behalf of YEP GAN.

**Stipulation and Order Directing Transmission of  
Original Exhibits to Appellate Court.**

IT IS HEREBY STIPULATED AND  
AGREED by and between the respective parties  
in the above-entitled cause, that the original records  
of the Bureau of Immigration, which were filed in  
the above-entitled court as exhibits, may be trans-  
mitted in their original form, and without being  
transcribed, to the United States Circuit Court of  
Appeals for the Ninth Circuit, and may be con-  
sidered a part of the record in the determination of  
this appeal in said United States Circuit Court of



Appeals for the Ninth Circuit, without objection on the part of any of the parties hereto.

Dated: September 14, 1923.

JOHN T. WILLIAMS,  
United States Attorney.

JOHN L. McNAB,

S. C. WRIGHT,

BYRON COLEMAN,

Attorneys for Petitioner and Detained, the Appellant.

So ordered.

Dated: September 14, 1923.

E. S. FARRINGTON,  
Judge.

[Endorsed]: Filed Sep. 14, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[15]

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**Certificate of Clerk U. S. District Court to Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 15 pages, numbered from 1 to 15, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the Matter of Yep Gan, No. 17,922, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein), and the instructions of the attorneys for the petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of five dollars and thirty-five cents (\$5.35) and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal issued herein. (Page 17.)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of September, A. D., 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,  
Deputy Clerk. [16]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,922.

In the Matter of the Application for Writ of Habeas Corpus on Behalf of YEP GAN.

**Citation on Appeal.**

United States of America,  
Northern District of California,—ss.

The President of the United States, to John D. Nagle, as Commissioner of Immigration at the Port of San Francisco, California, and to Honorable John T. Williams, United States District Attorney for the Northern District of California, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty (30) days from the date hereof pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, First Division, wherein Yep Gan and Lee Hon Min are appellants and said Commissioner of Immigration is appellee, to show cause, if any there be, why the order and judgment granted against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM C. VAN FLEET, United States District Judge of the Northern District of California, Southern Division, this 23d day of August, A. D. 1923.

WM. C. VAN FLEET,  
United States District Judge. [17]

Copy of the within is hereby admitted this 23d day of August, 1923.

JOHN T. WILLIAMS,  
United States District Attorney.

[Endorsed]: No. 17,922. In the Southern Division of the United States District Court for the Northern District of California, First Division. In the Matter of the Application for Writ of Habeas Corpus on Behalf of Yep Gan. Citation on

Appeal. Filed Aug. 23, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

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[Endorsed]: No. 4114. United States Circuit Court of Appeals for the Ninth Circuit. Yep Gan and Lee Hon Min, Appellants, vs. John D. Nagle, as Commissioner of Immigration at the Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed September 21, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,922.

In the Matter of the Application for Writ of Habeas Corpus on Behalf of YEP GAN.

**Stipulation and Order Extending Time to and Including October 23, 1923, for Return Day on Citation on Appeal.**

It is hereby stipulated and agreed that the return day on the citation on appeal may be, and the same

is, hereby enlarged to and including the 23d day of October, 1923.

Dated: September 21, 1923.

JOHN T. WILLIAMS,  
United States Attorney.

JOHN L. McNAB,  
S. C. WRIGHT,  
BYRON COLEMAN,

Attorneys for Petitioner and Detained, the Appellant.

So ordered.

Dated: September 21st, 1923.

PARTRIDGE,  
Judge.

No. 17,922. Southern Division United States District Court, Northern District of California, First Division. In the Matter of the Application for Writ of Habeas Corpus on Behalf of Yep Gan. Stipulation and Order Enlarging Return Day on Citation on Appeal.

[Endorsed]: No. 4,114. United States Circuit Court of Appeals for the Ninth Circuit. Order under Subdivision 1 of Rule 16 Enlarging Time to and Including October 23, 1923, to File Record and Docket Cause. Filed Sep. 21, 1923. F. D. Monckton, Clerk.



**United States**  
**Circuit Court of Appeals** 14  
**For the Ninth Circuit**

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In the Matter of WALTER V. EMPIE, Doing Business as WILLIS ALLEN MOTOR COMPANY, Bankrupt.

H. W. SWENDER,

Appellant,

vs.

WALTER V. EMPIE,

Appellee.

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**Appellant's Brief.**

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Upon Appeal From the United States District Court  
for the Southern District of California  
Southern Division

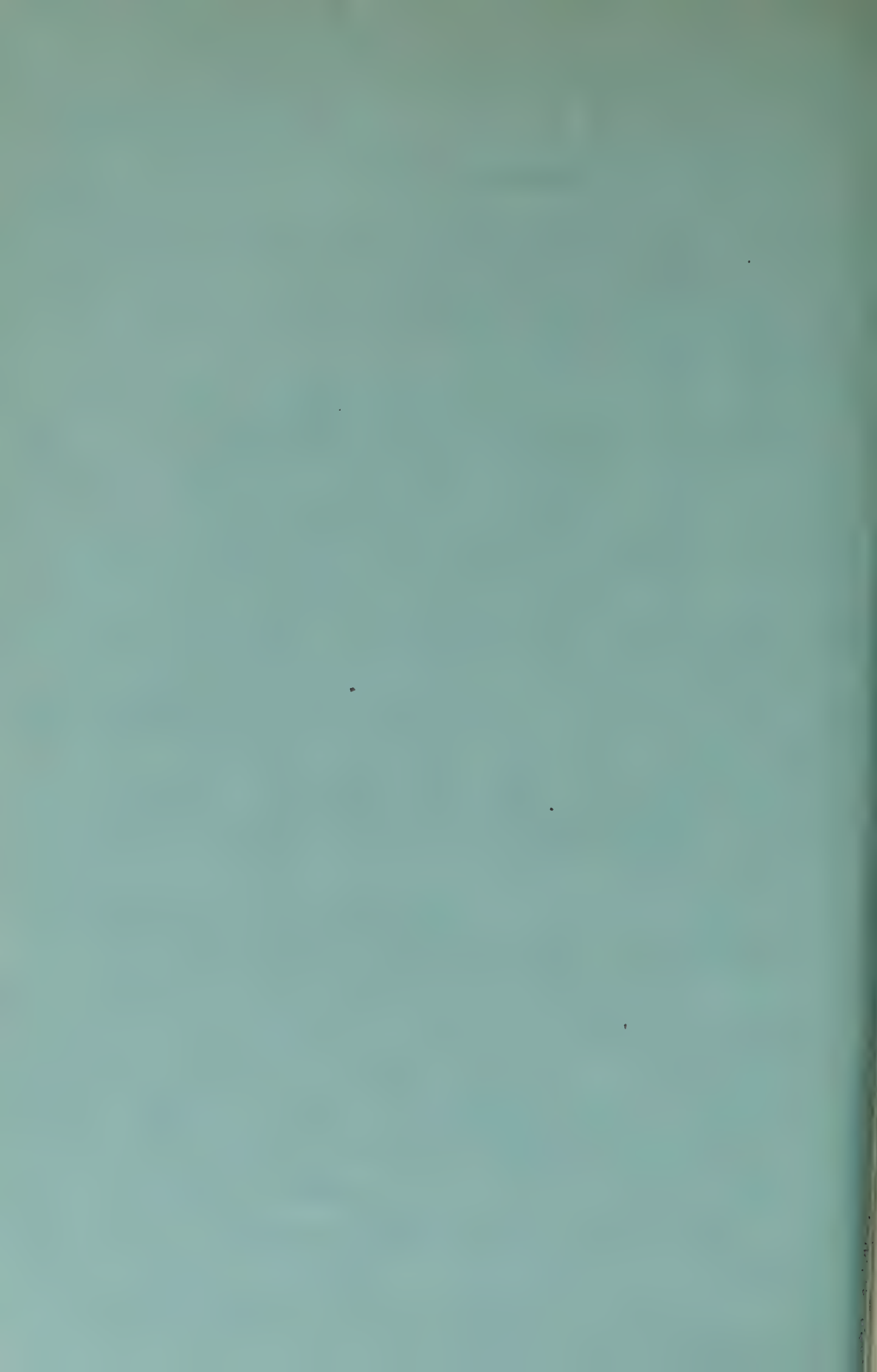
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ALLEN, ALLEN & EAGAN,

Suite 620 Ferguson Bldg.,  
3rd and Hill streets,  
Los Angeles, California,

*Attorneys for Appellant.*

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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In the Matter of WALTER V. EMPIE, Doing Business as WILLIS ALLEN MOTOR COMPANY, Bankrupt.

H. W. SWENDER,

Appellant,

vs.

WALTER V. EMPIE,

Appellee.

---

**Appellant's Brief.**

---

Upon Appeal From the United States District Court  
for the Southern District of California  
Southern Division

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ALLEN, ALLEN & EAGAN,

Suite 620 Ferguson Bldg.,  
3rd and Hill streets,  
Los Angeles, California,

*Attorneys for Appellant.*

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UNITED STATES CIRCUIT COURT  
OF APPEALS

FOR THE  
Ninth Circuit

IN THE MATTER OF  
WALTER V. EMPIE, doing  
business as Willis Allen Mo-  
tor Co., Bankrupt.

H. W. SWENDER,  
*Appellant,*  
vs.  
WALTER V. EMPIE,  
*Appellee.*

No. 4113

**APPELLANT'S OPENING BRIEF.**

The question presented by this appeal is: Does the admittedly false testimony of the bankrupt in this case amount to the commission of the offense of "false oath" as contemplated by the Bankruptcy Act?

The appellant is certain that the offense of "false oath" has been committed, and stands amazed at the holding which has been made in this case by the referee and confirmed by the District Court.

It is unthinkable to the appellant that the bankrupt could give false testimony; then, several months later, after his creditors had discovered and produced evidence showing the falsity of the former testimony that the bankrupt should admit the truth, and yet, notwithstanding the objection of creditors, receive a discharge.



The facts are these:

On July 6, 1922, at the first meeting of creditors, the bankrupt gave untruthful testimony, regarding the sale of his grand piano and phonograph. On November 17th, 1922, the creditor, H. W. Swender, caused to be produced before the referee evidence which showed that the former testimony of the bankrupt on July 6th was untruthful. On February 16, 1923, at the hearing on the specifications of objections to his discharge, the bankrupt gave testimony which was in substantial variance with his former testimony of July 6, 1922, and corroborated the testimony which the creditor, H. W. Swender, had caused to be produced before the referee on November 17, 1922.

The testimony of the bankrupt on July 6, 1922, at the first meeting of creditors is found in the Transcript on pages 9 to 35, inclusive. The important part of this testimony so far as this appeal is concerned may be summarized as follows: The bankrupt made oath before the referee that he, the bankrupt, about a year prior to bankruptcy, sold his grand piano and phonograph to some stranger whose name and address he did not remember, for a cash consideration of \$850.00 for the piano and \$300.00 for the phonograph, and that he had mingled the money thus received with his general funds and had spent it prior to his adjudication as a bankrupt.

The testimony produced by the creditor, H. W. Swender, on November 17th, 1922, which showed that the former testimony of the bankrupt on July 6th,

1922, was untruthful, is found on pages 26 to 33 of the Transcript. This testimony is now unimportant, so far as this appeal is concerned, for the reason that this testimony was later corroborated almost in every detail by the bankrupt himself on the occasion of his testimony at the hearing on the specifications of objections to his discharge.

The testimony given by the bankrupt on February 16, 1923, at the hearing on the specifications of objections to his discharge corroborated the testimony which the creditor, H. W. Swender, had produced before the referee on November 17, 1922, and was at variance with the testimony which he, the bankrupt, had theretofore given on July 7th, 1922, at the first meeting of creditors. The change in the bankrupt's testimony was due, of course, to the fact that in the interim the creditor, H. W. Swender, had discovered and produced evidence before the referee on Nov. 17, 1922, which showed the first testimony of the bankrupt to have been untruthful. The testimony of the bankrupt on February 16, 1923, in so far as it is important to this appeal may be summarized as follows: That the bankrupt instead of receiving cash or check as the consideration for the sale of his grand piano and phonograph, as he had formerly testified, had received two due bills, one of which due bills was in the sum of \$850.00, which was in payment for the grand piano, and the other of which due bills was in the sum of \$312.50 which was in payment for the phonograph; that this consideration, to-wit, the two due bills, was paid to him, not by a stranger

of unknown name and address as the bankrupt had testified to in the first instance, but by the Southern California Music Company of Los Angeles, which was the very same company from which the bankrupt had purchased the piano and phonograph about a year previously; and that the bankrupt retained these two due bills in his possession for about three months after receiving them in June of 1921, and then in September of 1921 (when several suits were pending against him in which judgments were subsequently rendered against him and which judgments the bankrupt listed as liabilities in his schedules) the bankrupt returned the two due bills to the same music company and obtained two other due bills identical with the two original due bills except that the name of the payee named in the due bills was changed from Walter V. Empie to Vernon H. Martin; that Martin is a brother-in-law of Empie, and was then residing in the State of Illinois, and at that time had no intention of coming to California; that these two due bills were payable only on a piano and phonograph respectively to the extent of their face value, and were not transferable; and (here is the important part) that the bankrupt had those two due bills in his possession at the time of his examination before the referee on July 6, 1922, when he testified that he had sold his piano and phonograph to a stranger whose name and address he did not know, for cash or check, and that he had mingled the money thus received with his general



funds and spent it prior to his adjudication as a bankrupt.

That the bankrupt could thus testify untruthfully, be discovered in his falsehoods, admit them, and still receive a discharge over the objection of his creditors, truly shocks the conscience. Yet such has been the decision in the case at bar, notwithstanding the fact that the Bankruptcy Act provides that a bankrupt who makes a false oath shall forfeit his right to a discharge in bankruptcy.

The erroneous decision in this case is the result of several fundamentally wrong constructions and applications of the provisions of the Bankruptcy Act. These errors are incorporated in the referee's report, which report was later confirmed by the District Court, following which, the discharge of the bankrupt was granted.

The report of the referee is full and complete, and gives in detail the reasoning of the referee in applying the provisions of the act to the facts in the case at bar. The closer this report is studied, the more glaring do the errors of law contained in it become. We will point them out.

### THE FIRST ERROR OF THE REFEREE.

The most fundamental error of the referee, and the error which was almost wholly if not entirely responsible for his erroneous decision, was his holding that the offense of "false oath" as contemplated by the Bankruptcy Act can only be committed where a bankrupt testifies untruthfully concerning prop-

erty which rightfully should belong to the bankrupt's estate and which should be apportioned in dividends to his creditors, and that no testimony however false, concerning property which the bankrupt owned prior to bankruptcy would constitute the offense of "false oath" as contemplated by the Bankruptcy Act unless the property concerning which the false testimony was given was proven to be property that should rightfully be administered in the bankrupt's estate. In other words the referee held that a "false oath" as contemplated by the act, must, in the first place, concern property only; and in the second place, the "false oath" must concern only such property as rightfully belongs in the bankrupt's estate.

Neither citations of authorities or argument sufficed to sway the referee from this mistaken position, and so, as a result this erroneous holding is to be found woven in and out throughout the whole report of the referee. Its first appearance is on page 46 of the Transcript, at the bottom of the page, which reads as follows: "From the evidence so adduced, the referee finds and concludes: That the bankrupt herein, Walter V. Empie, has not, as charged in the specifications of objections, committed an offense punishable by imprisonment as provided in the Bankruptcy Act. *At the time of bankruptcy and at the time of Empie's testimony the due bills or their proceeds belonged to Martin. Under such proof* Empie has neither knowingly nor fraudulently concealed while a bankrupt from his trustee any of the



property belonging to his estate in bankruptcy, nor has he knowingly and fraudulently made a false oath or account in or in relation to this or any other proceeding in bankruptcy." The words which we have italicized in the above quotation show that the referee believed that once it was shown that the property concerning which untruthful testimony was given did not belong to the bankrupt at the time of testifying, although it had belonged to him previously, that such fact in itself inhibited the bankrupt from committing the offense of "false oath," however untruthful his testimony might be concerning this particular property. In other words, the referee held that present ownership at the time of testifying was necessary to constitute false testimony a "false oath."

This erroneous holding appears again in the last paragraph on page 43 of the Transcript where the referee has applied his own conception of the offense of "concealment of assets" and "false oath" to the facts in the case at bar, as follows: "As the proceedings in respect to these two charges of false oath and concealment are quasi-criminal in their nature, proof that Empie is guilty as charged in the specifications should be at least clear and convincing to the effect that he knowingly and fraudulently intended to conceal these two musical instruments from his trustee, and that they were in reality his own property; and particularly that in order to carry out and consummate such concealment, he knowingly and fraudulently, with a memory of the transactions in

which he exchanged the musical instruments for the due bills, testified and made a false oath or account in respect thereto before the referee, that he had sold them, *being at the time his own property*, practically for cash down to a stranger whose name and description he did not remember. Empie did, in the first instance, testify that he had sold the piano and phonograph for cash or for check to a stranger as set forth in the charges contained in the specifications, and that they were his property. Later he corrected this testimony and testified that he had exchanged them for due bills, which latter due bills he had long before his bankruptcy used in payment of a certain debt owing by him to his brother-in-law, one Vernon H. Martin."

This quotation also shows that the referee believed that the bankrupt could only commit the offense of "false oath" by testifying untruthfully about property of which the bankrupt was the owner, at the time referred to in the false testimony.

In the closing words of the referee's report, on page 49 of the Transcript, next to last paragraph, there is still further evidence of the referee's mistaken conception of what constitutes a false oath, for he says: "No creditor or any party interested in this estate has been through his testimony deprived of any dividends or of any interest in or right as a creditor, or otherwise, to the said piano, phonograph due bills." From this language it is plain to be seen that the referee reasoned that even though the bankrupt had testified untruthfully, still since no creditor had been deprived of a dividend by reason

of the untruthful testimony, therefore no creditor would have been benefited if the bankrupt had told the truth; hence no offense had been committed.

We shall now show why the referee is in error in holding that untruthful testimony does not constitute the offense of "false oath" unless such untruthful testimony concerns property which belongs to the bankrupt and should be administered in the bankrupt's estate.

The Bankruptcy Act provides that no applicant shall receive a discharge who knowingly and fraudulently made a false oath or account in, or in relation to, any proceeding in bankruptcy. (Sec. 15 (b), (1) and Sec. 29 (b) (2).)

The act itself does not define a false oath but it has been well defined by the decisions in the reported cases upon the subject, and by the text writers.

Brandenburg on Bankruptcy, on page 1188, gives a very complete definition of the offense of "false oath" and each clause of the definition is substantiated by citations of decisions. The definition given by Brandenburg is as follows:

"A false oath is a wilful, deliberate, intentional falsehood; or statement of something that the person making *knows or should know* is untrue, or recklessly makes without knowing whether it is true or not, or without having reasonable grounds for believing it to be true, in regard to a material matter and may be in any part of the bankruptcy proceedings, but it must be all material to the proceedings in bankruptcy and have some relation to the bankrupt's estate *or his acts affecting his estate*, and be knowingly and fraudulently made."



The disposition that a bankrupt makes of his property and assets prior to bankruptcy, are certainly acts which affect the bankrupt's estate, and it has been repeatedly so held. The creditors have a right to inquire of the bankrupt as to the amount and the nature of the property that he owned prior to bankruptcy and they have the right to inquire of the bankrupt as to the circumstances and the manner in which such property went out of his possession; and it is the duty of the bankrupt in answer to such questions to make a full and complete disclosure in the utmost good faith as to his acts and the disposition which he had made of his property. This is so held in the case of *In re Conroy*, 134 Fed. 764, in which case on page 765 thereof is found the following:

“It is objected, however, before the court, that William P. Elder is not such a party in interest as entitles him to object to the discharge, and that, even if Conroy did testify falsely as to the property on Clifford street, it having been transferred to his wife on the 18th of December, 1895, and the title remaining in her since that time (for eight years), he is not now the owner thereof, and any statement he made under oath in his examination, under section 7 of the bankrupt law of July 1, 1898, C. 541, 30 Stat. 548, in regard to this property, even if false, would be no ground for a successful objection to a discharge. It has been held that a transfer of property to a man's wife in fraud of creditors nine years before the bankruptcy proceedings, and a failure to schedule this property so transferred, is no ground for objections to the discharge of the bankrupt. *In re Howell* (D. C.), 105 Fed. 594.

But this (*In re Howell*) is a different question entirely from that of 'making a false oath—in relation to any proceeding in bankruptcy.' Under section 14, Subd. 1, 30 Stat. 550, a discharge will be refused if the bankrupt has 'committed an offense, punishable by imprisonment, as herein provided'; and by section 29b, Subd. 2, 30 Stat. 554, 'knowingly and fraudulently making a false oath—in relation to any proceeding in bankruptcy' subjects the offender to 'punishment by imprisonment.' Was this a false oath in connection with his 'proceeding in bankruptcy'? It undoubtedly was. Whether this Clifford street property can now be administered by the bankrupt's estate is not the test as to the materiality of an inquiry into its ownership by creditors. The ownership of the property was a proper, legitimate, and material matter of inquiry in this bankrupt proceeding. If the property belonged to Conroy at this time, the creditors were entitled to that information; and the original ownership of the property, and the circumstances under which it passed out of his possession, were such that they were entitled to know the exact facts as to whether or not he was originally the owner, and when and how and under what circumstances it became the property of his wife; and, in this inquiry, if he fraudulently and knowingly made a false oath in regard to the ownership of the property at *any* time, he committed an offense punishable by imprisonment, under the act, and therefore sufficient to prevent a discharge. *In re Woodford Gaylord*, 7 Am. Bankr. Rep. 1, 112 Fed. 668, 50 CCA. 415."

From this case it is plain that the offense of "false oath" may be committed notwithstanding the fact that the untruthful testimony was given concerning property not subject to administration in the bank-



rupt's estate. Any other construction of the act is unreasonable, for in a separate subdivision of the act (Sec. 29 (b) (1)), it is provided that a bankrupt who conceals assets from his trustee shall not receive a discharge. According to the decision of the referee, the section of the act with reference to the offense of "false oath" does not have any application, unless the false testimony of the bankrupt concerns property which should have been but was not included in the bankrupt's estate. In other words, according to the referee's decision, since a "false oath" must concern property belonging to the bankrupt, which should have been included among his assets, therefore the objecting creditor must necessarily prove that there has been a "concealment of assets" by the bankrupt's false testimony before such false testimony amounts to a "false oath", as contemplated by the Bankruptcy Act. But the act, we have above pointed out, provides separate subdivisions for the offense of "concealment of assets" and for the offense of "false oath." Therefore, it is plain that the act intended that the subdivision with regard to the offense of "false oath" was intended to apply to false testimony of the bankrupt without respect to whether or not there was a commission of the offense of "concealment of assets." Any other construction of this provision of the act relating to "false oath" renders it mere surplusage. The presumption of the law is always against redundancy.

In addition to the Conroy case heretofore mentioned, there are numerous other cases which show that a bankrupt forfeits his right to a discharge when he gives false testimony, irrespective of whether such false testimony concerns property which would be a part of the bankrupt's estate. In the case of *In re Zoffer*, 211 Fed. 936, it was held in an opinion written by Justice Lacombe of the Circuit Court of Appeals for the Second Circuit that where the bankrupt, while testifying under oath before a special commissioner at the first meeting of creditors, swore positively and falsely that he had never made a statement of financial condition to any one, when he in fact had made a false financial statement to a commercial agency shortly before, he was guilty of knowingly and fraudulently making a false oath which was a bar to his discharge. The Justice said: "The written statement they did make was so close in time to the date when they denied making it that we cannot doubt the false oath was made 'knowingly and fraudulently'."

In the case of *In re Sheinberg*, 223 Fed. 218, the bankrupt at an adjourned meeting of creditors gave false testimony with reference to a financial statement he had made to a credit agency. Judge Mayers decision in this case reads in part as follows: "No testimony was adduced to show that any creditor relied upon the statement to the Dun Agency, and the result is that, so far as that statement was concerned, nobody was hurt. But because one of several specifications on objection to discharge fails for lack of

testimony, that result does not affect the question of false oath. One of the grounds upon which a discharge must be denied is that set forth in section 29b (2) of the Bankruptcy Act, which, in defining offenses, refers to a person who knowingly and fraudulently 'made a false oath or account in, or in relation to, any proceeding in bankruptcy.' I do not propose to give to this provision of the statute the narrow construction contended for by counsel for the bankrupt. The argument in effect is that, because the objectant did not succeed in showing that the statement to the Dun Agency was relied upon, therefore the false statement made no difference, and therefore the false oath in the proceeding before the referee was immaterial. But the result of the proceeding cannot be the test of the immateriality of the false oath. Wide latitude is accorded in this district to an inquiry under section 21a, for this court has long held the view that a prompt and comprehensive examination, sensibly conducted, may lead swiftly to the discovery of wrong doing. If therefore, a bankrupt is interrogated in respect of subject-matter which goes to the question of his discharge, such interrogation is clearly 'in relation to' a 'proceeding in bankruptcy' and a false oath made in the course of an examination under the statute, and in regard to a relevant subject of inquiry, is the kind of a false oath which, in my opinion, the Congress intended should bar discharge. For the reasons outlined, the report of the special master is confirmed, and the discharge is denied."



Other similar cases to the same effect are *In re* Luftig, 162 Fed. 322, 324 (3); *In re* Gottlieb, 262 Fed. 730; *In re* Kaplan, 245 Fed. 222.

The Conroy case, and other cases mentioned, show clearly that it is the intention of the act, that the provisions thereof with respect to the offense of "false oath" were intended to prevent the bankrupt from giving false testimony, whether such testimony tended to diminish his estate or not. To hold otherwise would allow a bankrupt to give false testimony concerning a fraudulent disposition of his assets prior to bankruptcy, and yet receive his discharge in bankruptcy provided the false testimony which he had given thereby prevented his creditors from discovering a fraudulent disposition of a portion of his assets shortly prior to bankruptcy. If, when first questioned concerning the disposition of his assets such a bankrupt gave a full and faithful account of his acts concerning his property, such testimony if followed by a prompt and vigorous investigation might lead to the discovery of wrong doing. But, if on the other hand, the bankrupt gave untruthful testimony when first questioned concerning his property, the creditors would thereby be thrown completely off the trail, and perhaps might never be able to discover the truth; and at the very least, the creditors would be so delayed by such untruthful testimony, in ferreting out the truth, that in the time thus gained by his untruthful testimony, the bankrupt might be enabled to completely remove all evidence of his fraudulent acts, or in some other manner make his fraudulent acts less susceptible of discovery.

For example, in the case at bar: It is very possible that had the bankrupt told the truth on his first examination, the objecting creditor might have uncovered a fraudulent concealment of assets by the bankrupt. But the bankrupt did not tell the truth. It took the objecting creditor nearly five months to find the “stranger” who bought Empie’s grand piano and phonograph. This interval gave the bankrupt and his brother-in-law ample opportunity to concoct a tale of “transfer to satisfy an antecedent indebtedness”, and to prevent in other ways the objecting creditor from proving that the sale was a fictitious one for the purpose of defrauding creditors. Perhaps the sale may have been a *bona fide* transfer. But if so why did the bankrupt not tell the truth on his first examination? He had the due bills in his possession at that time. He was well aware that he had not received cash or check and deposited it with his general funds, as he testified. The transaction has the earmarks of fraud. Here was a sale to a relative; living in a distant state; of two due bills payable only in bulky merchandise; shortly before bankruptcy and while financially involved; and of which due bills there was no continued change of possession; and over which the bankrupt continued to have dominion; and concerning which the bankrupt testified untruthfully, under oath, when questioned concerning it. Here are indeed many badges of fraud,—enough perhaps to have satisfied many a court of the fraudulent nature of the transaction. No one can say what further evidences of fraud the objecting



creditor might have discovered had the truth been told by the bankrupt at the outset. The bankrupt should not be rewarded with a discharge for his clever deceptions that may possibly, and very likely did, effectively conceal evidence which would have convinced the referee beyond a reasonable doubt that the whole transaction was fraudulent in its purpose; but rather the bankrupt should be denied a discharge, for failing to exhibit the utmost good faith and for failing to make the frank and full disclosure of his acts which the law requires.

The law wisely requires of the bankrupt that he shall make a frank and full disclosure of his acts, and that he shall exhibit the utmost good faith. This is so held in the case of Kaplan, 245 Fed. 222, wherein it was said: "On his examination the bankrupt again and again replied, 'I don't know,' 'I couldn't say,' 'I don't remember,' to questions concerning matters which had been within his knowledge, which had taken place within a few months before the examination, and which were of such character that entire forgetfulness concerning them all is incredible. . . . The Bankruptcy Act . . . extends to insolvent debtors very great benefits; but these are granted upon the assumption that the debtor will honestly perform his duties under the act. If he fail to do so in any particular on which objections to discharge may be grounded, there should be no hesitation in refusing the discharge. Few duties imposed by the act are of more practical importance than that to disclose fully to his creditors his transactions im-

mediately preceding the bankruptcy. Notwithstanding the finding of the learned referee, and the great weight to which it is entitled, I have no doubt that the bankrupt testified falsely on his examination. The finding of the learned referee must be set aside, and the second specification of objection must be sustained. It is unnecessary to consider whether the first specification is also established and I express no opinion on that point. Application for discharge refused.”

There was a like holding in *In re Lewin*, 103 Fed. 852, 853, a part of the opinion in which reads as follows: “The bankrupt law is very free about the granting of discharges, but it requires first that the sworn proceedings of the bankrupt shall be honest, and that requirement is very necessary to the proper and just administration of the law, and should not be frittered away. To say that the bankrupt had not paid any sum of money to his attorneys, because they had not then actually received any, but only an order for some; that the sum due for which the order had been given need not be put in, because that transferred it away from him; that the alimony was not a debt, the securing of which would be for the benefit of creditors; and that therefore there was no false sworn statement,—would be too transparent for a cover to the real transaction. This part of his sworn statements appears to be knowingly and fraudulently dishonest and false.—Discharge denied.”

The holding is the same in *In re Breitling*, 133 Fed. 146.

## SECOND ERROR OF THE REFEREE.

The second error in the report of the referee in this matter occurs on page 43 of the Transcript in the first sentence of the last paragraph on the page wherein he says: "As the proceedings in respect to these two charges of false oath and concealment are quasi-criminal in their nature." etc. The part of a sentence just quoted shows that the referee had a mistaken idea as to the nature of the proceedings on the hearing on the Specifications of Objections to the discharge. The proceedings are not quasi-criminal in their nature, but are purely civil. (*In re Lally*, 255 Fed. 358, 363, (3). This error may have caused the referee to require a higher degree of proof than was necessary, for the referee said that he would require the proof that Empie was guilty as charged to be "clear and convincing" whereas the correct rule is declared in *In re Lally* to be that "it is the duty of the court or jury to resolve the issues of fact according to a reasonable preponderance of the evidence and the proof required need only be such as to satisfy the reasonable mind." That this mistaken conception of the nature of the proceedings on the part of the referee affected his decision to the prejudice of the objecting creditor is plainly apparent in the third error on the part of the referee, which we shall now point out.



### THIRD ERROR OF THE REFEREE.

The third error of the referee is found on page 49 of the Transcript, beginning with the third line on the page, where he says: "The referee is not fully satisfied or convinced that Empie even at the time of his first examination hereinbefore set forth remembered the details of the transaction relating to the musical instruments and the due bills given in exchange therefor."

The error consists in the fact that the referee did not follow the law and did not allow the burden of proof to shift. The appellant believes it to be the law that when the objecting creditor has shown that the bankrupt has testified untruthfully as to the disposition made by the bankrupt of his property, the burden then shifts to the bankrupt to show that he did not give the untruthful testimony knowingly. In the case at bar the referee held that even after the objecting creditor had assumed the burden of establishing and had established the fact that the bankrupt has testified untruthfully in regard to the disposition of certain of his assets, that the burden still remained upon the objecting creditor to show that the bankrupt gave such untruthful testimony "knowingly." The objecting creditor believes it to be the law that once it has been shown by the objecting creditor that the bankrupt has testified untruthfully, the burden is then thrown upon the bankrupt to prove that the untruthful oath has not been made knowingly. If this rule of law as contended for by the appellant had been applied to the undisputed

facts in the case at bar and to the findings of fact as disclosed by the referee's report, the discharge of the bankrupt could not have been recommended. The findings of fact as disclosed by the referee's report show as follows: (Page 44 of the Transcript, beginning three lines from the bottom of the page) "Judged by the usual experience in human affairs and in the course of ordinary memory, it would seem that Empie should have remembered more promptly and more clearly the circumstances relating to his disposition of the piano and phonograph, unless it be that at the time of his interrogation he was confused, frightened or was suffering from an abnormal loss or defect of memory. It would seem that ordinarily he should have given the full facts on the first, as well as on the last occasion of his testimony in respect thereto. At no time, however, during the giving of his testimony did he appear frightened or confused, he seemed a frank, candid and willing witness; but his memory until refreshed seemed almost uniformly bad. He seemed not to realize or appreciate the solemnity of the proceedings or the importance of the truth concerning the transactions relating to the musical instruments. He did not seem to realize the responsibility cast upon him as a petitioner in bankruptcy proceedings."

Thus, it will be seen, the referee's report shows on its face that the presumption of the law was that the bankrupt did remember the circumstances relating to the bankrupt's disposition of the piano and phonograph—unless, so the report says—Empie was



suffering from a mental defect, or was confused or frightened. But the bankrupt offered no evidence to prove that he was suffering from any mental defect or that he was incompetent; and the referee's report in so many words negatives any idea that Empie gave the untruthful testimony because he was confused or frightened. The report specifically finds that he was not confused or frightened.

Therefore the appellant says that if the correct rule of law as to the burden of proof has been applied by the referee, the discharge of the bankrupt could not have been recommended. The objecting creditor showed that untruthful testimony had been given. The referee should have shifted the burden of proof to the bankrupt to show that such untruthful testimony had not been given knowingly. If the burden had been so shifted, the discharge of the bankrupt could not have been recommended, for the referee's report shows that the bankrupt produced absolutely no evidence to excuse his former false testimony that he had sold his grand piano and Victrola for cash or check and deposited the money with his general funds, when at the very instant of so testifying, he had in his possession the proceeds of the sale of the piano and Victrola in the form of due bills. Thus the bankrupt utterly failed to sustain the burden of proof which should properly have been thrust upon him. On a charge of "concealment of assets" the bankrupt is not charged with the primary burden of proving that he has not concealed property; but when his creditors have proven that shortly before bank-

ruptcy the bankrupt owned certain property, the burden of proof then shifts to the bankrupt to show that he has disposed of it. (*In re Lally*, 255 Fed. 358, 362.) So, likewise, upon a charge of "false oath" the burden is not on the bankrupt in the first instance to prove that he has not made a false oath, but when his creditors have produced evidence to show that he has testified untruthfully in regard to his disposition of certain assets, the burden then shifts to the bankrupt to show some legal excuse, if any he has for testifying untruthfully. This rule of law was not applied by the referee, but it is the correct rule of law and has been so held in an opinion written by Justice Hough of the circuit court of appeals for the second circuit in the case of *In re Gottlieb*, 262 Fed. 730, in which it is said on page 733 thereof:

"In matters of discharge every objecting creditor starts out with the burden of proving that which he alleges. *In re Miller*, 212 Fed. 920, 129 C. C. A. 440. But when a set of facts is shown which unexplained would lead a reasonable man to believe the allegations of the objector, the bankrupt must explain, and a deficit in assets far less than that demonstrably existing here has been held sufficient for that purpose in this court. *In re Loeb*, 232 Fed. 601, 146 C. C. A. 559; *In re Schultz*, 250 Fed. 103, 162 C. C. A. 275. Nor is any creditor called upon to prove the substance of his objection beyond a reasonable doubt; a fair preponderance is enough. *In re Garrity*, 247 Fed. 311, 159 C. C. A. 404. When such condemning facts are shown, the bankrupt's usual effort is in confession and avoidance; he admits the facts and

seeks to avoid by ignorance, and thereby show lack of intent; for the objecting creditor has the burden, not only of showing facts, in the ordinary sense of the word, but intent also. *In re Garrison*, 149 Fed. 178, 79 C. C. A. 126. But intent, being pre-eminently a fact or phenomenon that (barring confession) can never be proved otherwise than by inference, the same facts—i. e. acts and documents—which cast the burden of explanation or evidence upon the bankrupt also cast on him the burden of disproving the intent of doing those things which are the inevitable and natural consequences of said acts and documents. This is well considered by Sanborn, J., in *McKibbon vs. Haskell*, 198 Fed. 639, 117 C. C. A. 343, and was, we think, plainly indicated in our decision *In re Weston*, 206 Fed. 281, 124 C. C. A. 345.”

The presumption of the law is that every man intends the ordinary and natural consequences of his acts. Applied to the case at bar this means that when the bankrupt testified untruthfully, the law will presume that he did so knowingly and intentionally. This presumption stands until the bankrupt shows by proper evidence that he did not give untruthful testimony knowingly or intentionally.

In the case at bar the bankrupt has neither met nor overcome the presumption that he gave the untruthful testimony knowingly, by any evidence which proves or even tends to prove that the bankrupt did not testify untruthfully with full knowledge of the true facts.

The only one of the untruthful statements made by the bankrupt during his examination before the referee at the first meeting of creditors which the



bankrupt in any way tried to excuse or explain at the hearing on the specifications of objections to his discharge was his statement that he had sold his piano and phonograph to some stranger whose name and address he did not remember. The bankrupt's explanation of this testimony was that he had so testified because he had requested the Southern California Music Company, the company from which he had bought the piano and phonograph, to help him find a purchaser for his piano and phonograph and that he "understood" that his piano and phonograph had been taken from his home directly to the home of the new purchaser whose name he did not know. This was the reason the bankrupt gave for having testified that he had sold his piano and phonograph to some stranger whose name and address he did not know. The bankrupt gave his trustee and his creditors no clue as to the real disposition of the phonograph and piano prior to the time they themselves uncovered the truth.

In view of the fact that the consideration that the bankrupt received for his piano and phonograph was in the form of two due bills issued to him by the Southern California Music Company, the explanation is a very lame one indeed, particularly from a man who has passed the bar examination in this state. In only a very roundabout way could a "stranger" be considered the purchaser when the seller received his consideration from the Southern California Music Company.

The very excuse that the bankrupt gave for his former untruthful testimony to the effect that he had sold his piano and phonograph to a "stranger" whose name he did not remember, shows that it must have been necessary for him to remember the part the music company had in the transaction in order for the bankrupt to remember the reason why the purchaser was a "stranger" to him. In other words, Empie must have remembered the part the music company played in the transaction, for he testified that he sold his piano and phonograph to a stranger whose name and address he did not know, and later the bankrupt explained that he had so testified because the sale was made through the music company. This explanation by the bankrupt only points the more strongly to the fact that the bankrupt at the time of his former testimony must have had in mind the part played by the music company in the sale. If he did, the bankrupt must certainly have remembered that he had received not a check or cash, but instead that he had received due bills. But irrespective of anything else the bankrupt must certainly have remembered that he did not mingle any money received on the sale with his general funds as he testified, when at that very instant of testifying he had in his possession the proceeds of the sale in the form of the due bills. True enough the due bills that he then had in his possession were not the identical pieces of paper. They were the successors of the original due bills. But nevertheless, they still represented the consideration which Empie had received



for his piano and phonograph, and they must have been an ever present reminder to him that he, the bankrupt, had not received cash which he had mingled with his general funds, but rather due bills which at that very moment he was trying to sell.

So therefore, even if the bankrupt's explanation of his testimony that he had sold his piano and phonograph to some stranger whose address he did not know were taken at face value, it offers no explanation or legal excuse for the remainder of his untruthful testimony in regard to this transaction, but rather only strengthens the objecting creditor's contentions that the bankrupt did remember at the time of giving the untruthful testimony that he had not received cash, and that he had not mingled any money thus received with his general funds and spent it prior to his adjudication in bankruptcy.

So, in conclusion on this point, we repeat that the undisputed facts, and the findings of the referee in this case show that the recommendation of the referee cannot stand as a matter of law for the reason that the bankrupt has offered absolutely no evidence to overcome the presumptions of law which follow from a showing by the objecting creditor that the bankrupt has given untruthful testimony in regard to the disposition of certain of his assets; and that the bankrupt's explanation of his reason for testifying that he had sold his piano and phonograph to a stranger, to say the least, showed that the original testimony of the bankrupt was not a frank and full disclosure of the transaction, nor an exhibition

of that good faith which the law requires of every bankrupt.

Furthermore, even if the bankrupt's explanation of his reason for testifying that he had sold his piano and phonograph to a stranger whose name and address he did not remember were deemed a satisfactory explanation of that particular part of his untruthful testimony, nevertheless such explanation furnished no legal excuse for the bankrupt's further testimony to the effect that he received cash or check for his piano and phonograph, which money he mingled with his general funds and spent prior to his adjudication as a bankrupt. On the contrary the bankrupt's partial explanation is only the stronger proof that the bankrupt gave the untruthful testimony knowingly.

When the correct rule as to the burden of proof is applied to the bankrupt's testimony and to the statement of the facts as the referee has set them forth in his report, it is plain that the referee erred in recommending that the bankrupt receive his discharge.

However, irrespective of the matter of burden of proof, there is still another reason why the referee was in error in saying in his report that he was not fully satisfied or convinced that Empie remembered the details of the transaction relating to the musical instruments and the due bills given in exchange therefor. The referee seemed to believe that it was purely a question of fact as to whether Empie remembered the circumstances surrounding the sale of

and the consideration received for his grand piano and Victrola. The referee seemed to believe that he had the right to believe if he chose to do so, the bankrupt's oft repeated parry: "I don't remember," "I don't recall," "I haven't thought of that thing in years." (Transcript, page 14, line 12).

But the question as to whether the bankrupt did or did not remember the truth at the time of giving the false testimony is not always a question of fact, for sometimes it is question of law. When a bankrupt testifies as to important and outstanding facts within his knowledge at the time of testifying, and gives false testimony about these important and outstanding facts, it is no longer a question of fact as to whether the bankrupt remembered the truth, it is purely a question of law. The law cannot microscopically examine a man's mental processes and thus tell whether he remembered. Therefore the law presumes that man does remember important and outstanding facts within his knowledge at the time of testifying, and properly holds him to account for testifying falsely concerning them. If Empie's false testimony had related to some remote time or to some trivial detail, it might then be said to be a question of fact as to whether he remembered the truth at the time of giving the false testimony. But it did not. Empie's false testimony related to important things, in existence and in his possession at the very moment of giving his testimony. He had the due bills in his possession when he testified that he sold for cash or check and deposited the money with his general



funds; and he had, so he testified at the hearing on February 16, 1923, exchanged the original due bills for due bills running to his brother-in-law who lived in Illinois and with whom the bankrupt corresponded concerning the due bills and arranged through this correspondence to pay off a debt of his to his brother-in-law of \$500.00 with these due bills by assigning these due bills to his brother-in-law, who, upon receiving these due bills through the mail from the bankrupt, immediately remailed them to the bankrupt and instructed the bankrupt to sell them for him. Empie had the due bills in his possession for the purpose of selling them for his brother-in-law at the very instant that he testified on oath before the referee that he had sold the piano and Victrola to a "stranger" for cash or check and deposited the money thus received with his general funds. The law draws the conclusion that he remembered these facts. No other conclusion is possible. The law does not permit the referee to decide as a question of fact, whether Empie remembered, for the law says that he does remember. It is a question of law, not a question of fact. Legally to excuse false testimony concerning facts which the law says he does remember the appellee must prove mental incompetency or some disorder of the brain such as paresis or the like. This is so held in *State vs. Coyne*, 21 LRA-NS 993, 997. In the case at bar, the bankrupt made no attempt to produce any such evidence. Therefore the appellant believes that the referee was in error in giving any credence or effect to the bank-

rupt's self-serving declarations, that he "did not remember," and that he "did not recall," and that "he had not thought of that thing in years."

#### FOURTH ERROR OF THE REFEREE.

The fourth error of the referee is found on page 48 of the Transcript, last sentence on the page, where he says: "As to the alleged false oath, the proof should be also clear that it was not only knowingly made but that it was *fraudulently made*." This quotation shows that the referee believed that there was some distinction between "knowingly made" and "fraudulently made," for two sentences further on in his report the referee says: "But, nevertheless, even if a finding could be sustained by the evidence that Empie in the first part of his examination knowingly gave false testimony and made a false oath, there is no evidence to support or sustain a further finding that he fraudulently made a false oath." Just what the referee believed the distinction was between these two terms does not appear from his report except as shown in the following sentence of his report where he says: "No creditor or any party interested in this estate has been through his testimony deprived of any dividends or of any interest in or right as a creditor, or otherwise, to the said piano, phonograph, due bills." This sentence shows that the referee believed that it is one of the necessary elements that the false testimony should deprive or tend to deprive some creditor of a dividend before such false testimony can be said to be "fraud-



ulently made.” This is not the law, however, as we have shown in an earlier portion of this brief. The cases there cited, particularly the case of *In re Conroy*, show conclusively that the offense of “false oath” can be committed irrespective of whether or not the property concerning which the bankrupt testified untruthfully was or should have been a portion of the bankrupt’s estate; and in fact these cases show that the offense of false oath may be committed without the question of assets or dividends being involved at all, for it has been held a “false oath” for a bankrupt to testify that he had not made a financial statement when as a matter of truth he had made one, although it was not proved that any one had relied upon it or had been deceived thereby. (*In re Zoffer*, 211 Fed. 936; *In re Sheimberg*, 223 Fed. 218).

Furthermore, it is the law that when a bankrupt gives false testimony “knowingly,” he is deemed to have given it “fraudulently” as well. This is so held in *Wechsler vs. U. S.*, 158 Fed. 579, in which Justice Lacombe says in his opinion, that when a person states matter which he does not believe to be true, wilfully and contrary to his oath, he may certainly be said to make a false oath “knowingly and fraudulently.” The holding was the same in *In re Hale*, 206 Fed. 856, 857, where it is said: “The false oath must be knowingly and fraudulently made, and an oath may be considered to have been so made when made by a person who states matters which he does not believe to be true, wilfully and contrary to his

oath.” If a false oath is knowingly made, it is immaterial that there was no specific intent to deceive. (State vs. Waterman, 210 Pac. 208). Therefore, the appellant believes that the referee was in error in believing and holding that a false oath could be “knowingly made” and still not be “fraudulently made.” The appellants believe it to be the law that when a bankrupt gives false testimony “knowingly,” he is deemed to have given it “fraudulently” as well.

#### FIFTH ERROR OF THE REFEREE.

The fifth error of the referee is found on page 45 of the Transcript, line 10 *et seq.*, where the referee said: “He (Empie) seemed not to realize or appreciate the solemnity of the proceedings or the importance of the truth concerning the transactions relating to the musical instruments. He did not seem to realize the responsibility cast upon him as a petitioner in bankruptcy proceedings. . . . However, a conflict or inconsistency in his testimony seemed to trouble or embarrass Empie not at all.” The referee’s error in this respect consisted in his recommendation of the discharge of the bankrupt despite his own finding that the bankrupt did not appreciate the importance of testifying truthfully and did not seem embarrassed by the inconsistencies in his testimony. In other words, the appellant’s contention is that the judgment is not supported by the findings. It was error for the referee to admit in one breath that the bankrupt was careless with the truth and even unembarrassed when confronted with the discrepancies

in his testimony, and in the next breath to recommend his discharge. The referee's finding on this point alone is sufficient to require the denial of the bankrupt's discharge. This court has said on numerous occasions that the requirements made upon the bankrupt to obtain the benefits of the bankruptcy act are simple and easy, but that the utmost good faith and the fullest and most complete disclosures are required of him, and that the court should not show the least hesitation to deny a discharge where these easy requirements are not met. The bankrupt here is a university graduate; has been admitted to the practice of law in this state; and is employed as a clerk in one of the local courts. No attempt was made to prove that mental incompetency was responsible for the discrepancies in his testimony. The appellant fails to see why Empie should be granted a discharge despite the discrepancies in his testimony simply because he did not seem troubled or embarrassed by the inconsistencies in his testimony. He should not receive a discharge because he was a good actor and made the best of a bad situation. It is not necessary that the bankrupt break down and confess his fraudulent intentions in order that the offense of false oath may be adjudged to have been committed. The appellant believes that the referee's findings of the bankrupt's disregard of the necessity of telling the truth and of his utter lack of embarrassment over the inconsistencies in his testimony require *per se* the denial of the bankrupt's discharge.



## SIXTH ERROR OF THE REFEREE.

In his report the referee states that Empie *corrected* his former false testimony. It does not appear from the referee's report just what part this so-called "correction" played in causing the referee to recommend the discharge of the bankrupt despite the false testimony. However, in the oral argument before the referee, it was plain that the referee believed that because Empie, at the time of the hearing on the specifications of objections to his discharge, completely changed his testimony and testified truthfully concerning those things about which he had testified untruthfully on his first examination several months before, that this so-called correction partially, if not almost wholly excused the former untruthful testimony. This, of course, is not the law, for if it were the law, no bankrupt would ever again be adjudged to have made a "false oath" for the reason that the bankrupt could safely testify untruthfully when first examined and then, if his falsehoods were ever discovered, he could then "correct" his testimony and tell the truth, and still avoid the consequences of a false oath. The portion of the referee's report that refers to this so-called "correction" is found on page 44 of the transcript, beginning with line 5 thereon: "Empie did, in the first instance, testify that he sold the piano and phonograph for cash or for check to a stranger as set forth in the charges contained in the specifications, and that they were his property. *Later he corrected this testimony* and testified that he had

exchanged them for due bills, which latter due bills he had long before his bankruptcy used in payment of a certain debt owing by him to his brother-in-law, one Vernon H. Martin.”

It should need no citation of authorities to show that it is too late for a bankrupt to relieve himself from the consequences of a false oath by telling the truth at the hearing on the specifications of objections to his discharge when the objections to the discharge are based upon matters concerning which the bankrupt had testified untruthfully at the first meeting of creditors several months before. . . . And particularly is this so, where, as in the case at bar, the bankrupt never told the truth until after the objecting creditor had produced evidence *aliunde* which proved that the bankrupt’s testimony upon his first examination was untrue. The bankrupt’s confession at the time of the hearing on the specifications of objections to his discharge is too late to relieve him of the consequences of a false oath. The *locus penitentiae* had long since been passed. This is so held in *In re Marcus*, 192 Fed. 743, 744.

These, then, are the reasons why the discharge of the bankrupt should have been denied:

First: That it is not necessary in order to constitute the offense of “false oath” that the false testimony must concern property which should be included in the bankrupt’s estate. The offense is complete when the bankrupt knowingly testifies falsely upon any proper subject of inquiry.



Second: That the proceedings on the hearing of the specifications of objections to a bankrupt's discharge on the ground of "false oath" are not quasi-criminal in their nature but are purely civil; and that the proof required should need not be "beyond a reasonable doubt" or "clear and convincing" but instead it is the duty of the court to resolve the issues of fact according to the reasonable preponderance of the evidence.

Third: That when the objecting creditor proves that the bankrupt has testified untruthfully as to the disposition of his property, the burden of proof should then shift to the bankrupt to show that such testimony was not given knowingly and fraudulently.

Fourth: That in the absence of any legal excuse, such as mental incompetency or the like, the bankrupt will be deemed by law to have "knowingly" testified falsely, when he gives untruthful testimony regarding important facts which at the time of testifying were within his knowledge.

Fifth: When a bankrupt "knowingly" gives false testimony, he is deemed by law to have given it "fraudulently" as well.

Sixth: That when a bankrupt holds the truth lightly, and is apparently not concerned over discrepancies in his testimony, such facts *per se* require the denial of his discharge, for the law requires the utmost good faith on his part, and the fullest and most complete disclosure of his acts, and does not hesitate to deny a discharge where these simple requirements are not met.

Seventh: That it is too late at the hearing on the specifications of objections to his discharge for a bankrupt to avoid the consequences of a false oath by correcting his false testimony given several months before.

This appeal is not taken for the purpose of securing Empie's prosecution criminally for the offense of false oath. The time for such a criminal prosecution under the bankruptcy act is limited to one year after the commission of the offense; and the statute therefore has run. There are two reasons why the objecting creditor has prosecuted this appeal. First, because it was plain that the law had not been followed; and second because the objecting creditor hopes and expects the payment of the bankrupt's debts if the discharge is denied. If the objecting creditor were not reasonably sure of his grounds in both of these respects this appeal would not have been taken. The principle involved on this appeal is all important. The law abhors false testimony. Untruthful testimony by a bankrupt as to the circumstances under which property passed out of his possession prior to his bankruptcy tends to deprive his creditors of a proper opportunity of proving that such transfer may have been fraudulent. False testimony hinders the bankrupt's creditors; it delays them in their investigations; and it may even prevent the discovery of fraud. Furthermore, a bankrupt should not be permitted to constitute himself the judge as to which of his property he may safely give false testimony, and as to which other of

his property he must testify truthfully. A bankrupt may not thus usurp the functions of the judge. It is the bankrupt's duty to tell the truth, the whole truth, and nothing but the truth; and to leave it to the law to draw the inference as to whether or not the assets concerning which he testifies should properly be a part of the bankrupt's estate.

The appellant firmly believes that the Bankruptcy Act plainly intends and has been construed to mean that no bankrupt should receive a discharge who knowingly testifies falsely upon any proper subject of inquiry.

For these reasons then, and upon the foregoing grounds, the appellant respectfully requests that the judgment and order of the district court confirming the report of the referee and granting a discharge to the bankrupt, be reversed.

Respectfully submitted,

ALLEN, ALLEN & EAGAN,

*Attorneys for the Appellant.*



No. 4113.

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IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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In the Matter of  
WALTER V. EMPIE,  
Doing Business as Willis Allen Motor  
Co., Bankrupt.

H. W. Swender,

*Appellant,*

*vs.*

Walter V. Empie,

*Appellee.*

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BRIEF OF APPELLEE.

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JOHN W. LUTER,  
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*Attorneys for Appellee.*

WARREN LEE KINDER,  
*Of Counsel on Brief.*





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**BRIEF OF APPELLEE.**

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**STATEMENT OF THE CASE.**

The appellant begins his opening brief by argument and makes no statement of the case.

This is an appeal from an order of the United States District Court for the Southern District of California, Southern Division, made on June 13, 1923, granting a discharge in bankruptcy to Walter V. Empie, an adjudged bankrupt. [Tr. p. 2.] The appeal is upon the sole ground that court erred in granting said order of

discharge, over the objections of appellant, that the said bankrupt had made a false oath in the bankruptcy proceedings. [Tr. p. 7.]

The said Walter V. Empie was adjudged a bankrupt by the said court on May 20, 1922. [Tr. p. 6.]

On July 6, 1922, at the first meeting of the creditors, the said bankrupt was interrogated with reference to the sale of a piano and phonograph, and he testified that in 1920 he owned a Packard Grand Piano and a Victrola, and sold the piano for \$850.00 and the phonograph for about \$300.00; that he had a hazy remembrance of the transaction; that he did not recall the details of the transaction, but if given an opportunity would look it up and give full information at the next meeting (he repeated this latter statement for at least sixteen times during the examination); that he did not recall the name of the party to whom sold; that he believed that he received a check or paper of some kind; that it was not in currency, and must have been a check; that he did not remember whereabouts in Los Angeles the sale took place; that the sale was in the fall of 1920, but was not sure it was not in 1921; that, as he remembered, the purchaser came to his house with a truck and took the instruments away; that he did not recall the storage company that moved them away; that he had been in partnership with Willis Allen, a brother of the attorney herein, in the Willis Allen Motor Company, and the partnership went on until he filed suit for dissolution of the partnership and an accounting; that the sale was

not made in contemplation of bankruptcy; that the transfer of the piano and phonograph was not to a person that he owed money or to a personal friend or relative or business associate; that it was not a pledge or security for money; that he didn't have any claim on the piano or phonograph or anything giving him a right to redeem; that he didn't remember how he happened to get this purchaser, that the party was an absolute stranger,—that he did not recall the incident; that the proceeds received went into his general funds; that he didn't remember what bank he deposited them in; and was trying to explain when interrupted; and that the sale was for a fair value. [Tr. pp. 9 to 25 inc.]

On November 17, 1922, further testimony was taken, and D. J. Cuthbert, a representative of the Southern California Music Company, testified that in June, 1921, the bankrupt executed bills of sale of the piano and phonograph to the company but no money was paid and they stood as a credit until September 8, 1921, when due bills for the same were issued to one Vernon H. Martin. The said Vernon H. Martin testified that he was a brother-in-law of the bankrupt and received the said due bills from the bankrupt in September of 1921, in payment of a debt that the bankrupt had owed him since June, 1919; that he returned the due bills to the bankrupt and asked him to sell them for him; that these due bills were only good for one particular musical instrument each; that the bankrupt sold his (Martin's) \$850.00 due bill for a piano, to a man

named Miles, and that he received the contract with Miles by mail and he signed and returned it; that the bankrupt could not sell the \$312.00 due bill (for the phonograph) and returned it, and he (Martin) still had it. The said Leroy W. Miles testified that he met the bankrupt on a street car and was telling the bankrupt about being dissatisfied with a piano that he had purchased, when the bankrupt told him that he knew where he could get a due bill that would save him some money; that subsequently he went to see the bankrupt and arranged a contract; (contract between Vernon H. Martin and Leroy W. Miles here introduced in evidence); that he was making monthly payments on the contract with Martin; that the bankrupt told him that the due bill belonged to Martin; that he purchased the due bill on August 11, 1922; and that he signed a bill of sale from the Music Company to Martin at the time the piano was delivered.. (The bankrupt offered and attempted to explain this transaction but was not permitted to do so.) [Tr. pp. 26 to 30 inc.]

On December 2, 1922, the appellant, H. W. Swender, a law partner of counsel for appellant, filed specifications of objections as a creditor to the discharge of the said bankrupt on the grounds, (1) of having made a false oath in relation to his proceedings in bankruptcy, (2) of having concealed property, and (3) of having failed to keep books of account. [Tr. pp. 6 and 7.]

On February 16, 1923, the said bankrupt testified at the hearing of the Creditors' Specifications of Objec-



tions to Discharge of the bankrupt, regarding the sale of the piano and victrola; that in June, 1921, he contemplated returning to Texas and decided to dispose of the piano and victrola and advertised them and asked the Southern California Music Company to assist him in selling them, and signed a bill of sale to them so that they could do so; that he believed, and was sure, that he was out of town at the time the deal was actually closed, but he understood that a truck called at his home and took the piano and victrola to the purchaser; that he thought he knew the name of the purchaser at the time but did not then recall it; that the due bills were then sent to him through the mail; that he didn't know whose truck called for the piano and victrola; that he didn't remember the date, thought the dates in the record, of June 1st and June 3rd, 1921, were correct, but was not positive; *that it was at least a year before he filed his petition*, on May 19, 1922; that the due bills were not transferable, and one read for a Grand Piano and the other for one Victrola; that at that time he owed his brother-in-law, Martin, \$500.00, and Martin wrote him,—as he remembered it,—in August, 1921, that he wanted the money; that he asked the said Martin if he was willing to accept the due bills, as it was not convenient to pay the money then; and he agreed to accept them; that as the due bills were not transferable, he went to the Music Company—if he remembered right,—about the 12th of September, 1921—and had them issue new due bills to Martin, and he sent them to him; that Martin returned the due bills to said bankrupt right away

and asked him to dispose of them, as he, Martin, could not do anything with them in Illinois; that he did not dispose of them until he sold them to Miles,—which, as well as he remembered—was about August 11, 1922; that he had the two due bills, that is, Martin's due bills, at the time he testified in the bankruptcy proceedings on July 6, 1922; that he didn't remember exactly when he received the due bills issued to him by the Music Company (the first set of due bills issued), but his remembrance was that he signed a release or bill of sale, or whatever it was called so that they could go ahead and sell for him, and a little later on he found out, while he was out of the city, they were sold to a stranger—he thought he heard the name at the time but didn't remember it—and while out of the city they had the piano and victrola taken from his house to some other place, he thought to the house of the purchaser, and shortly after he received the due bills through the mail, he didn't remember the exact date, but thought it was early in 1921. [Tr. pp. 33 to 42 inc.]

On March 16, 1923, the referee filed his report to the effect that none of the objections to the discharge had been sustained, and recommended the discharge of the bankrupt. [Tr. p. 42.]

The findings of the referee in reference to charge of false oath was considered in connection with the charge of "concealment of property," and the charge of "concealment" was the first in order in their joint consideration.

The referee in setting forth the matters to be considered stated that as the proceedings were quasi-criminal, the proof should be "clear and convincing" that he *knowingly and fraudulently* intended to conceal the two musical instruments, and that they were in reality his own property, and particularly that in order to carry out and consummate such concealment, he with a memory of the transactions in which he exchanged the musical instruments for the due bills, testified and made a false oath that he had sold them, being at the time his own property, practically for cash down to a stranger.

The referee, in referring to the manner in which the examination of the bankrupt was conducted, stated that there was much animosity displayed by counsel in the examination; that one Willis Allen, a brother of one of the counsel for the objecting creditor (who was a former partner of this counsel) and the son of another of such counsel had been engaged in partnership with the bankrupt, wherein it appeared that the said counsel was also interested; that the bankrupt put up \$10,000.00 in the business against the experience of the said Willis Allen, and the partnership had resulted in disagreements and litigation in which much animosity had been engendered, with the result that frequently during the examination, both in the bankruptcy proceedings and the hearing of the objections, the atmosphere of the court room vibrated with the enmity and antagonism which the parties concerned felt for each other.

The referee, in referring to the manner in which the bankrupt testified, stated that the bankrupt did in the first instance testify that he sold the piano and phonograph for cash or for check to a stranger and that they were his property, and later corrected this testimony and testified that he had exchanged them for due bills, which he had long before his bankruptcy used in payment of a debt to his brother-in-law, one Vernon H. Martin; that he testified under persistent pressure, and persistently requested time and opportunity to look up the details of the transaction; that it would seem that he should have remembered more promptly and clearly the circumstances relating to his disposition of the piano and phonograph, unless he was confused, frightened or suffering at the time from some abnormal loss of memory; that he did not appear frightened or confused, but did not seem to realize the responsibility cast upon him as a petitioner in bankruptcy proceedings or the importance of the truth concerning the transaction relating to the musical instruments and did not seem embarrassed or troubled at all by a conflict or inconsistency in his testimony; that he seemed a frank, candid and willing witness, *but his memory, until refreshed, seemed almost uniformly bad*; that his memory when elicited in response to direct questions was abnormally bad, and yet his reactions in response to questions tending in their nature to be leading was extremely candid; and that the general impression made upon the referee as to the bankrupt's attitude in respect to matters concerning which he was



interrogated and in respect to his willingness to testify was favorable.

The referee then found that, from the testimony taken both in the bankruptcy proceedings proper and also on the hearing of the objections to the discharge, the bankrupt had not committed an offense punishable by imprisonment as provided in the bankrupt act; that at the time of bankruptcy and at the time of the bankrupt's testimony, the due bills or their proceeds belonged to Martin; that under such proof the bankrupt had neither *knowingly* nor *fraudulently* concealed while a bankrupt any of the property belonging to his estate in bankruptcy, nor had he *knowingly and fraudulently* made a false oath or account in or in relation to this or any other proceeding in bankruptcy; and that in respect to the specific objection charging him with having knowingly and fraudulently concealed while a bankrupt from his trustee the said piano, phonograph and due bills and of having knowingly and fraudulently made a false oath or account in respect to them, he was entitled to his discharge and the same should be granted.

The referee then found that the transfer of the due bills to Martin by the bankrupt was in good faith.

The referee also found that with respect to the charge of having made a false oath, that he was not fully convinced that the bankrupt even at the time of his first examination remembered the details of the transaction relating to the musical instruments and the due bills given in exchange therefor, and knowingly made a false oath.



And lastly, the referee, after stating that the proof should be clear that the alleged false oath was not only knowingly made, but also that it was fraudulently made, he made his finding that even if a finding could be sustained that the bankrupt in the first part of his examination knowingly gave false testimony and made a false oath, there was no evidence to support or sustain a further finding that he *fraudulently* made a false oath, no creditor or any party interested in the estate had been, through his testimony deprived of any dividends or of any interest in or right, as a creditor or otherwise, to the said piano, phonograph and due bills; and *that the bankrupt should be discharged*.

On June 13, 1923, the said court ordered a discharge of the bankrupt and the Honorable District Judge thereof rendered an opinion in which he stated, that after a careful reading of the various transcripts having to do with the matters involved in the objections to the discharge of the bankrupt, he was constrained to affirm the findings of the referee and order the discharge; that there was nothing in the evidence to justify the conclusion that the referee was wrong in holding that the bankrupt had not "knowingly and fraudulently" made a false oath. [Tr. p. 49.]

On June 25, 1923, a motion for a rehearing was denied. [Tr. p. 50.]

On June 25, 1923, the appellant filed specifications of error, to the following effect: (1). [Tr. pp. 2 to 5.]

This appeal is based solely upon the ground that the bankrupt made a false oath. [Tr. p. 7.]

## ARGUMENT.

The appellant in his brief has made his argument under six alleged errors of the referee, and we will endeavor to follow the same chronological order, after first discussing two additional matters, viz: (1) the effect of the lack of specifications of error, and (2) the nature of the appeal, in the sense of whether this is an appeal from the order of the court or from the findings of the referee.

The argument, therefore, will be grouped under the following heads: (1) absence of specifications of error; (2) the nature of the appeal; (3) the falsity and materiality of the testimony of the bankrupt; (4) the quantum of proof requisite to the denial of a discharge; (5) knowledge of falsity on the part of the bankrupt; (6) fraudulent intent of the bankrupt; (7) failure of the bankrupt to realize importance of the testimony; (8) the effect of correction of testimony by bankrupt; and (9) the presumptions accorded the findings of the referee and the order of the court on appeal.

### I.

#### **Absence of Specifications of Error.**

The appellant in his brief failed to incorporate therein his specifications of error.

“If a brief contains no specification of the errors relied upon, the court may refuse to consider it and may affirm the judgment, or dismiss the appeal.”

3 C. J. 1414;

Rule 24 U. S. Circuit Court of Appeals, Ninth Circuit

Considering the flagrant violation of this well known and long standing requirement, we insist that the order discharging the bankrupt be affirmed and the appeal be dismissed.

The appellant in lines 9 to 10 on page 4 of appellant's brief in referring to the bankrupt's return of due bills to the Music Company, states that it was "when several suits were pending against him in which judgments were subsequently rendered against him and which judgments the bankrupt listed as liabilities in his schedules."

Also, in lines 12 to 14 on page 34 of appellant's brief, it is stated that the bankrupt is "a university graduate; has been admitted to the practice of law in this state; and is employed as a clerk in one of the local courts."

These statements, nor either of them, were matters referred to in the specifications of error, nor were they a part of the record. They have no place in the brief; and we are confident that, pursuant to the usual practice of courts, these highly unfair and improper references will be disregarded; especially in view of the fact "that evidence as to the matters concerning these suits was excluded only because of appellant's objections. [See Tr. p. 22.]

Statements not sustained by the record are improper and will be disregarded by an appellate court, and such practice is condemned by courts.

Stevens v. Haile (Tex.), 162 S. W. 1025.

The appellant (appellant's brief, p. 16), also attempts by insinuations to attack the sale by the appellee to his brother-in-law of the due bills in question. This matter is expressly excluded from the appeal by the agreed statement of facts. [Tr. pp...] The purpose of its inclusion is obvious.

## II.

### Nature of Appeal.

The appellant in his brief discusses the appeal on the sole ground of errors in the findings of the referee; the order of the court discharging the bankrupt is disregarded altogether.

The report of the referee consists of: (1) A statement of the issues involved, and the requisite quantum of proof; (2) a statement of the manner in which the examination was conducted; (3) a statement of the conduct and demeanor of the bankrupt while testifying; (4) a statement of the evidence,—which has not been controverted; and (5) the deductions and conclusion of the referee from the evidence, and his *recommendation* of discharge.

While we believe and strenuously contend that each and every one of the opinions expressed and the conclusions reached by the referee are true and correct, and in accord with the evidence, we do not understand, however, that it is necessary that these findings be invulnerable to attack, in order that the order of the court discharging the bankrupt be affirmed.



As we view it, the question is whether or not the order of discharge was justified, irrespective of statements contained in the findings of the referee or the manner in which his recommendation was reached. The order was made by the court after reading all the transcripts in the case; and error must be predicated on the order not the findings. Therefore, it is apparent that the appellant has mistaken his remedy.

In a similar situation it has been said:

“The appellate court reviews the action of the court on the report of a master in chancery in equity causes, and not the action of the master *per se*. Therefore, the third assignment of error, that ‘the master erred in the report which he made to the court, filed April 4, 1907,’ cannot be considered.”

Braxton v. Liddon, 55 Fla. 785, 46 So. 324, 325.

### III.

#### **Falsity and Materiality of Testimony.**

##### **Alleged First Error of Referee.**

The appellant under this head (appellant’s brief, pp. 5-18), takes three (3) partial and unconnected statements in the findings of the referee and labors to show, by strained construction and perversion of obvious meaning, that the referee erred in “holding that the offense of ‘false oath’ \* \* \* can only be committed where a bankrupt testified intentionally concerning property which rightfully should belong to the bankrupt’s estate and which should be apportioned



in dividends to his creditors." There was no such holding or finding by the referee.

The first statement of the referee relied upon by the appellant (appellant's brief, p. 6), contains the words "that he sold them (the musical instruments), being at the time his own property, practically cash down to a stranger." [Tr. p. 44.] This was a mere recital of the referee as to what the bankrupt did testify to, and the referee stated that it was necessary that it be shown that he testified to this "knowingly and fraudulently."

The second statement of the referee relied upon by the appellant (appellant's brief, pp. 7-8), contains the words, "At the time of the bankruptcy and at the time of Empie's testimony the due bills or their proceeds belonged to Martin." [Tr. p. 47.] The referee was here considering the charge of "concealment" with the charge of "false oath." The quoted words were used in immediate juxtaposition with the word "concealed," and it is plain that they referred specifically and solely to the charge of "concealment;" for later on in the findings, the referee gives additional reasons for not sustaining the charge of "false oath." Furthermore, the referee specifically states that other matters were considered, for he says that from the "transcripts of the testimony taken both in the bankruptcy proceedings proper and also on the hearing of the objections to discharge," the alleged "concealment" and "false oath" was not shown to have been "knowingly and fraudulently" made.

The third statement relied upon by the appellant (appellant's brief, p. 8), contains the words, "No creditor or any party interested in this estate has been, through his testimony deprived of any of dividends or of any interest in or right as a creditor, or otherwise to the said piano, phonograph, or due bills." [Tr. p. 49.] The referee was here considering solely the question whether or not the alleged false oath was "fraudulently made." The question whether or not a false oath could be made as to property that was not a part of the bankrupt estate was not being considered at all. The referee clearly had a right, and was duty bound, to take these matters into consideration in connection with the other evidence in the case, in determining whether or not the alleged "false oath" was made with a fraudulent intent. It is a proposition beyond dispute, that where an alleged "false oath" involves property that could not have been reached by the bankrupt's creditors or property in which his rights are not clear, these matters are entitled to weight in determining whether or not it was made with a fraudulent intent.

See *In re Hirsh*, 96 Fed. 468;

*In re Todd*, 112 Fed. 315;

*In re McCrea*, 161 Fed. 246.

The position taken by the referee was, that after considering all the evidence and the nature of the testimony given by the bankrupt and the manner in which given and his inability to remember unless di-

rectly questioned to specific things, the evidence was not sufficiently "clear and convincing" to show that he had "knowingly and fraudulently" made a false oath. The question as to whether or not the right to deny a discharge was confined to a "false oath" as to matters concerning property which should be included in the estate, is not considered or discussed as a legal proposition anywhere in the findings. The cases cited by appellant on this proposition, are, therefore, not in point.

Let it be considered in what respects the testimony of the bankrupt was untrue or false.

The bankrupt testified that he owned a Packard Grand Piano and a Victrola that he bought from the Southern California Music Company, and sold them in 1920 or in 1921, he wasn't sure which [Tr. p. 9]; that he didn't remember the details of the transaction, and requested time to look it up [Tr. p. 10]; that the sale was to a stranger,—that he didn't recall the incident scarcely [Tr. p. 12]; that he didn't remember how he happened to get this purchaser [Tr. p. 12]; that as he remembered the purchaser came to the house in his absence from the city and took the musical instruments away; that he believed he received a check or paper of some kind [Tr. p. 13]; that the proceeds of the sale went in with his general funds [Tr. p. 25]; and that he did not remember what bank he deposited the proceeds in, and added, "I was doing business with the Security Trust & Savings and with the Hellman Bank. I don't remember just— (Here

the witness was interrupted by counsel before finishing his answer, and being permitted to explain.) [See Tr. p 25.]

The facts are that the bankrupt in June, 1921, turned the piano and phonograph over to the Music Company on a promise by them to sell the piano and phonograph for him, and executed a bill of sale to expedite matters [Tr. pp. 26 and 36]; subsequently, the piano and phonograph were removed from his home, during his absence, and shortly thereafter the Music Company sent him through the mail two non-transferable due bills, one calling for a piano and the other for a phonograph, and in the same amount that he paid for them [Tr. p. 26]; in September, 1921, his brother-in-law Martin called on the bankrupt to pay a debt, and he had the due bills changed in favor of Martin and sent them to him, and Martin returned the due bills to the bankrupt and asked him to sell them [Tr. p. 31]; the bankrupt retained the due bills until August, 1922, when an acquaintance on a street car who mentioned being dissatisfied in the purchase of a piano, and the bankrupt told him that he was sure he could get him a due bill that would save him money; and a few days thereafter arranged the transfer of Martin's due bill for the piano to him. [Tr. p. 31.]

Considering the testimony and the facts, it will be observed that the musical instruments were in fact sold to a stranger; the Music Company would not have given a due bill for the same amount as the original



purchase price if there had not been a sale by them when they removed them from his house, and the record is silent as to whom they were actually sold. Regarding the receipt of due bills instead of “a check or paper of some kind,” this is not such a great dissimilarity as to show falsity in fact. The appellant attempts to show the bankrupt testified he received “cash” though the testimony shows that the word “cash” [Tr. p. . . .] used by the bankrupt was in the form of a question and not an answer—a habit of the bankrupt to repeat questions, appearing all through his examination. The proceeds did in fact go into his general funds, as they liquidated a standing indebtedness. The bankrupt, contrary to the contention of counsel for appellant, never did testify that he deposited the proceeds in bank. While he was trying to recall, he was interrupted by counsel for the appellant, and never did finish the answer. This portion of the answer, therefore, cannot be considered against him. Considering the whole matter, the ultimate result was the same. Counsel for appellant in the examination, avowed that his purpose was to find out who was the purchaser. [Tr. p. 25.] The purchaser was a stranger to the bankrupt, as the evidence shows. Furthermore, the bankrupt was not asked how the transaction was made. The appellant’s questions were directed to the sole object of finding out the name of the purchaser. The bankrupt was unable to tell him. The answer of the bankrupt was not false in fact to the specific questions directed to him.



The appellant, however, would have the impression prevail that a discharge must be denied if there be any inaccuracy of detail, either in a literal or a legal sense. Such is not the law.

The alleged false testimony, to warrant the denial of a discharge must be materially false; manifestly false in every sense of the word.

For example, it has been held that where a bankrupt testified that he did not have a bank account at the time of his petition in bankruptcy and that he was not his father's partner and had never had a bank account, it was held that the evidence was insufficient to show the making of a "false oath," where he had never had such account in his own name, although there had been an account in the joint name of himself and his father and mother, and the bankrupt had testified in a previous action that he had paid for an automobile with his own money, which he took from the bank for that purpose.

*In re Wilson*, 269 Fed. 845.

## II.

### Proof Warranting Denial of Discharge.

#### Alleged Second Error of Referee.

The appellant under this head (appellant's brief, p. 19), contends that the referee mistook the proceedings as being quasi-criminal and required a higher degree of proof than was necessary; and that a "preponderance of the evidence" was sufficient to justify the denial of a discharge.

The referee stated that the evidence must be at least "clear and convincing" that the bankrupt knowingly and fraudulently made a false oath. This is the law, whether the proceedings be regarded as being civil or quasi-criminal. A mere preponderance of the evidence is insufficient to warrant the denial of a discharge on the ground of having been guilty of an offense punishable by imprisonment, as provided in the bankrupt act. (*In re Braus*, 243 Fed. 55.)

The great weight of authority is that to warrant the denial of a discharge on the ground of having made a false oath, must be "clear and convincing."

*Humphries v. Nalley* (U. S. C. C. A. Ga.),  
269 Fed. 607;

*In re Lally* 255 Fed. 358;

*In re Taylor*, 188 Fed. 479;

*In re Hamilton*, 133 Fed. 823;

See also

*In re Troutman*, 251 Fed. 930.

Curiously enough, the rule is thus stated in the only case cited by appellant in this connection, *in re Lally*, 255 Fed. 358, where the court said:

"The evidence must be clear, convincing and satisfactory."

### III.

#### **Knowledge of Falsity.**

##### **Alleged Third Error of Referee.**

The appellant under this head (appellant's brief, pp. 20-31), attacks the statement and finding of the

referee that he was not fully satisfied or convinced from the evidence that the bankrupt remembered the details of the transaction as to which he was questioned.

Counsel for appellant first contend (appellant's brief, pp. 20-28), that it was shown that the bankrupt testified untruthfully and the burden shifted to him to show that he did not give the untruthful testimony knowingly; and unfairly states, that the referee held that even after the objecting creditor had assumed the burden of establishing and had established the fact that the bankrupt had testified untruthfully in regard to the disposition of certain of his assets, that the burden still remained upon the objecting creditor to show that the bankrupt gave such untruthful testimony knowingly.

The referee made no such holding. The only holding of the referee, was that under all of the evidence he was not convinced or satisfied that the bankrupt had "knowingly" given false testimony as to the transaction.

Furthermore, there was no such burden cast upon the bankrupt. This is not a situation in which a bankrupt makes a positive and unqualified statement as to some fact which is shown to have been absolutely false, and in the nature of things, to give rise to a presumption that he must have wilfully made the statement with full knowledge of its falsity. The bankrupt repeatedly stated that he did not remember the details of the transaction, and again and again, re-

quested an opportunity to refresh his memory. The question is not whether the testimony as to the details of the transaction were or were not true, but is, whether the bankrupt actually did remember them and did not give true testimony as to his recollection. The bankrupt having testified that he did not recollect the details of the transaction, the objecting creditor carried the burden of showing that he did in fact remember them.

Counsel for appellant in an attempt to set up another presumption, didactically state (Appellant's Brief, pp. 28-30) that the bankrupt was presumed by law to remember and fully recollect the details of the transaction; that a witness is presumed by law to fully recollect a transaction as to which he is called upon to testify.

There can be no such presumption. There is no fixed standard of the memory of mankind. The strength of memory varies in different individuals. Moreover, some details make a far less impression than others on the mind of even the same individual. With all, memory is fleeting.

The case of *State v. Coyne*, 214 Mo. 344, 114 S. W. 8, 21, L. R. A. (N. S.) 993, cited by appellant (Appellant's Brief, p. 30), fails altogether to support the statement of counsel and is far from being in point—that is, for appellant—for the case makes no reference whatsoever to any presumption, either of law or fact, and, furthermore, it is there held that the question as to whether one has testified falsely with knowledge



of such falsity is a question of fact for the jury, and where the defendant has sworn only as to his belief that it is necessary to show that he well knew the contrary of what he swore, and cites Cook's Case, 1 Rob. (Va.) 729, as holding that an indictment for making a false oath in a schedule of debts was subject to demurrer where it did not aver that the debtor well knew and remembered that the omitted debts were justly due and owing.

A search of the authorities is refreshing in the confirmation of the belief that no jurisdiction sanctions the irrational doctrine that appellant would have exist. A contrary doctrine, however, does obtain.

“The law does not presume that what is once known will always be present in the memory.”

Fire Ass'n v. LaGrande, etc., Compress Co.  
(Tex Civ. App.), 109 S. W. 1134.

The evidence, when considered in its entirety, certainly fails to show that the bankrupt “knowingly” made a false oath. The evidence is far from being “clear and convincing” that false testimony was “knowingly” given.

The examination was had some thirteen months after the sale of the musical instruments. In the meantime, the bankrupt had been engaged in constant controversies, quarrels and litigation in the disastrous business venture with counsel for appellant, their kinsman and the objecting creditor in which he put up \$10,000.00 as against “business experience” and lost.



This surely was calculated to make him forget details that otherwise he might remember. Furthermore, the bitter manner in which he was examined and the excessive hostility and constant clashes and bickering of counsel could not have failed to affect him materially. If the examination had been conducted in a proper manner, the bankrupt would obviously have been better able to fix his mind on the questions asked with a result that he would have had a far clearer recollection than he did. Moreover, the witness was constantly asked as to whom the sale was made. The bankrupt was not led by suggestive questioning as to how the sale took place. With the avowed object of counsel that he wanted to find out who purchased the musical instruments, it is not strange that the bankrupt should have centered his efforts on an attempt to recollect who this particular person was. The result is that the bankrupt had in mind the whole time, the person who took the musical instruments from his home. Constantly, the bankrupt testified that he could not then recollect the details of the transaction, and persistently requested an opportunity to refresh his recollection.

The referee's findings were that the atmosphere of the courtroom during the examination vibrated with the enmity and antagonism which the parties felt; that the bankrupt testified under persistent pressure, and persistently requested time and an opportunity to look up the details of the transaction; that the bankrupt seemed a frank, candid and willing witness, but

his memory, until refreshed, seemed almost uniformly bad; that his memory when elicited in response to direct questions was abnormally bad, and yet his reactions to questions tending in their nature to be leading were extremely candid; and that he gave a favorable impression of a willingness to testify as to the matters concerning which he was interrogated.

Manifestly, the evidence fails to show that the bankrupt “knowingly” gave false testimony.

The appellant had the burden of showing not only that the statements of the bankrupt were absolutely and unqualifiedly false, but also that they were made by him with full and complete knowledge at the time, that they were false; that he actually did remember the details and gave false testimony as to his recollection.

In a similar case, where it was charged that a bankrupt had “knowingly and fraudulently” made a false oath in the affidavit as to his petition for discharge and the accompanying schedule of property, by omitting certain shares of stock in a company of which the bankrupt was manager, which were held in his wife’s name and claimed to be held for his benefit, and twelve out of the seventy-one shares obtained by the wife were paid for out of the corporate profits, it was held that the evidence was not sufficient to show that he had “knowingly and fraudulently” made a false oath; and the court said:

“It is obvious that no ground exists, within the statute, unless the proof establishes both ingredients of the offense,—ownership in fact by

the bankrupt of the shares in question, and clear knowledge of such fact on his part, either directly shown or necessarily implied from the circumstances."

Fellows v. Freudenthal, 102 Fed. 731, 733.

#### IV.

##### Fraudulent Intent.

##### Alleged Fourth Error of Referee.

The appellant alleges (Appellant's Brief, pp. 31-33), that the referee was in error in stating that the proof must show that the alleged false oath was not only "knowingly" made, but also "fraudulently" made.

The referee stated the law. The authorities are in accord, that to preclude a discharge on the ground of having made a "false oath," it must appear from the evidence that the alleged "false oath" was not only made "knowingly," but was also made "fraudulently."

See:

*In re* McCrea, 161 Fed. 246;

*In re* Hamilton, 133 Fed. 823;

*In re* Bryant, 103 Fed. 789;

*In re* Crenshaw, 95 Fed. 632;

And see:

Humphries v. Nally, 269 Fed. 607;

*In re* Eaton, 110 Fed. 731.

The appellant also complains (Appellant's Brief, p. 31), of the statement of the referee that, "No creditor or any party interested in this estate has been through

his testimony deprived of any dividends or of any interest in or right as a creditor, or otherwise, to the said piano, phonograph, or due bills." [Tr. p. 48.] The contention is, that the referee believed that it was necessary that the false testimony should deprive some creditor of a dividend before it could be said to be "fraudulently made." The referee made no such statement. The referee merely took this as being a circumstance to show the absence of any fraudulent intent. This was proper.

The rule is, that where an alleged "false oath" relates to property which could not have been reached by the creditors or property in which the bankrupt's rights are uncertain, these matters are entitled to weight in determining whether or not it was made with a fraudulent intent.

See:

*In re Hirsh*, 96 Fed. 468;

*In re Todd*, 112 Fed. 315;

*In re McCrea*, 161 Fed. 246.

The appellant contends, however, that it is not necessary that the bankrupt should have made the alleged false oath with any intent to deceive, and cites the cases of:

*In re Zoffer*, 211 Fed. 936;

*In re Sheinberg*, 223 Fed. 218;

*State v. Waterman* (Idaho), 210 Pac. 208;

as sustaining his contention. The cases cited cannot be regarded as authorities for this proposition. The

case of *In re Zoffer*, 211 Fed. 936 makes no reference whatever as to an intent to deceive. The case of *In re Sheinberg*, 223 Fed. 218, involved the question as to the effect a bankrupt's statement to a commercial agency not being relied upon by any creditor, and not to any intent of the bankrupt at the time of giving his testimony. The case of *State v. Waterman* (Idaho), 210 Pac. 208, lays stress on the effect of the omission of the words "with intent to deceive" in a statute, by holding that the reason that it was not necessary to allege these words was that they were purposely omitted in the statute under consideration.

There can be no question but what there must be an intent to deceive of some character. The very meaning of the word "fraudulently" imports that such must be the case.

"It implies a deliberately planned purpose and intent to deceive and thereby to gain an unlawful advantage." 27 C. J. 893, citing:

*Montreal Bank v. Thayer*, 7 Fed. 622, 625.

Accordingly, the rule is, that the false oath must have been made with a fraudulent intent; the word "fraudulently", as used in this connection, meaning with an intent to deceive.

See:

*In re McCrea*, 161 Fed. 246;

*In re Bryant*, 104 Fed. 789;

*In re Crenshaw*, 95 Fed. 632.



For example it has been held that where a bankrupt failed to schedule an interest in the estate of his deceased father, it was not necessarily attributable to a fraudulent intent, so as to justify the refusal of a discharge on the ground of his making a false oath, when by the will of his father the property was left in trust, and the question whether or not the bankrupt had an interest therein which was transferable, was involved, and he, moreover, claimed to have transferred all of his interest in the estate to his wife while solvent.

*In re McCrea*, 161 Fed. 246.

Accordingly, where a bankrupt omitted from his schedule certain stock which he subsequently included in an amended schedule and offered to surrender to his trustee, and it appeared that the stock was sent by him to an agent for sale some two years before and at that time it was subject to sale for unpaid assessments, and subsequently the bankrupt had become insolvent and all his property had been placed in the hands of a receiver, and pending the bankruptcy proceedings, the bankrupt, in a suit in a state court testified to such facts, and also testified that he had forgotten the stock, not having regarded it of value, and did not know what had been done with it. It was held that, even if the testimony of the bankrupt in the state court was considered, it did not establish the charge of having knowingly and fraudulently made a false oath to the original schedule, there being a failure to show a fraudulent intent.

*In re Eaton*, 110 Fed. 731.

And, where a bankrupt, more than four months before the commencement of the proceedings, had transferred a stock of goods to his wife, and the bankrupt stated in his schedule that he had no assets of any kind, it was held that such transfer, although it may have been void as to creditors, was valid as to him, and therefore its absence in the schedule was not such a false oath as would forfeit his right to a discharge; and the court said:

“The oath must have been false in fact. There must have been an intentional wrong in making it. It must have been willful, and for the purpose of concealment and to mislead and defraud his creditors. In the absence of proof of intentional wrong in making the oath, the bankrupt’s failing to schedule and deliver up the property for the benefit of his creditors will not bar his discharge, even though the transfer to his wife may have amounted to constructive fraud and have been void as against creditors.”

*In re Crenshaw*, 95 Fed. 632, 633.

The findings of the referee are, that the bankrupt seemed a frank, candid and willing witness; that his reactions in response to questions tending in their nature to be leading was extremely candid; and that he gave a favorable impression of a willingness to testify as to the matters concerning which he was interrogated.

Furthermore, both the findings and the transcripts show that he repeatedly requested an opportunity to refresh his memory, and again and again offered to

look the matter up and give full information. [Tr. pp. 9 to 25.] Moreover, he offered to explain the whole transaction at the first succeeding proceedings, but was denied the privilege. [Tr. p. 10.] In addition, the transaction as to which he testified had transpired long before his bankruptcy and concerned property that was not a part of the estate, so there could have been no motive in giving false testimony. Considering every circumstance, it is at once manifest that there was no showing of a fraudulent intent.

## V.

### **Failure to Realize Importance or Materiality of Proceedings.**

#### **Alleged Fifth Error of Referee.**

This appellant under this head (Appellant's Brief, pp. 33-34), contends that it was error for the referee to recommend the discharge of the bankrupt, after stating in his findings that the bankrupt seemed not to realize or appreciate the solemnity of the proceedings or the importance of the truth concerning the transactions or his responsibility as a petitioner in bankruptcy, and did not seem to be troubled or embarrassed by a conflict or inconsistency in his testimony.

This does not constitute a finding, and the only importance to be attached to it, is that it seemed to negative any wrongful intent or fraudulent purpose on the part of the bankrupt. Unless the referee was satisfied from the entire evidence that the alleged false

statements were both knowingly and fraudulently made, it was his duty to recommend the discharge.

## VI.

### Effect of Correction of Testimony.

#### Alleged Sixth Error of Referee.

The appellant, under this head (Appellant's Brief, pp. 35-36), refers to the statement of the referee, that the bankrupt after testifying that he sold the piano and phonograph for cash or for check to a stranger and later corrected this testimony and testified that he exchanged them for due bills which had been used long before bankruptcy in payment of a debt, and complains that this influenced the referee in refusing to sustain the charges. There is no intimation in the finding that it did. However, contrary to the contention of appellant, the law recognizes the right to refuse to deny a discharge where the bankrupt corrects his testimony as to errors in statements previously made.

See:

*In re Doyle*, 199 Fed. 247.

Thus it has been held that a bankrupt's discharge would not be denied on the ground that he made a false oath, that he did not in a certain year transfer any property to his wife, where it appeared that before the completion of his examination he explained that he had testified inadvertently and mistakenly regard-



ing such transfer, and that it had not been his intention to testify falsely.

*In re Doyle*, 199 Fed. 247.

The Marcus case cited by appellant certainly cannot be said to establish appellant's proposition that erroneous testimony cannot be corrected so as to obviate the denial of a discharge. The court in this case merely expressed his personal opinion as to the weight of evidence given to correct testimony, but he did not state as a matter of law that such testimony is not available to preclude the bankrupt from being denied a discharge, for the bankrupt in that case was given a discharge, and the court said:

It is nevertheless open to the bankrupt to show from his whole testimony whether his testimony, if actually false, was not intended to mislead upon a material point."

*In re Marcus*, 192 Fed. 743.

To same effect:

*In re Eaton*, 110 Fed.

## VII.

### Presumptions on Appeal.

The findings of the referee in this case were approved by the court; furthermore, the court also reviewed the transcripts of evidence. *Prima facie*, therefore, the order is correct, and under the well recognized presumptions that obtain, should be affirmed.

The rule is well settled, that the findings of a referee affirmed by trial judge will not be set aside on



appeal on anything less than a demonstration of plain mistake, and that justice requires a different conclusion.

Fallows v. Continental etc. Trust etc. Bank,  
235 U. S. 300, 35 Sup. Ct. Rep. 29, 59 L.  
Ed. 238;

Dupree v. Watson, 216 Fed. 483;

*In re Tunpin Hotel Co.*, 248 Fed. 25;

Canner v. Webster Tapper Co., 168 Fed. 519;

*In re Sweeney*, 168 Fed. 612;

*In re Dorr*, 196 Fed. 292.

“The reversing court will hesitate especially to overturn the referee’s finding of fact; for the referee is in a better position to judge of the testimony, since he heard it given, and noted the demeanor of the witnesses, and was in a position where he could feel the weight of the spoken words. Only manifest error will justify a reversal of the facts.”

3 Remington Bankruptcy, Sec. 2861.

### Conclusion.

Counsel for appellant in closing (Appellant’s Brief, pp. 38-39), set forth pretended reasons for this appeal. We feel sure that this court will ignore such improper statements.

The position that we take is (1), that the answers of the appellee to the questions as propounded and in connection with the avowal of the purpose of counsel, were not false in fact; (2) that the evidence was

not “clear, convincing and satisfactory” that the appellee “knowingly” made a false oath; and (3) that the evidence failed to show that the alleged untruthful testimony was given with a “fraudulent intent.”

We most earnestly urge that the order of discharge be affirmed.

Respectfully submitted,

JOHN W. LUTER,

WALTER J. LITTLE,

*Attorneys for Appellee.*

WARREN LEE KINDER,

*Of Counsel on Brief.*

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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In the Matter of WALTER V. EMPIE, Doing Business as WILLIS ALLEN MOTOR COMPANY, Bankrupt.

H. W. SWENDER,

Appellant,

vs.

WALTER V. EMPIE,

Appellee.

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**Appellant's Petition for Re-Hearing**

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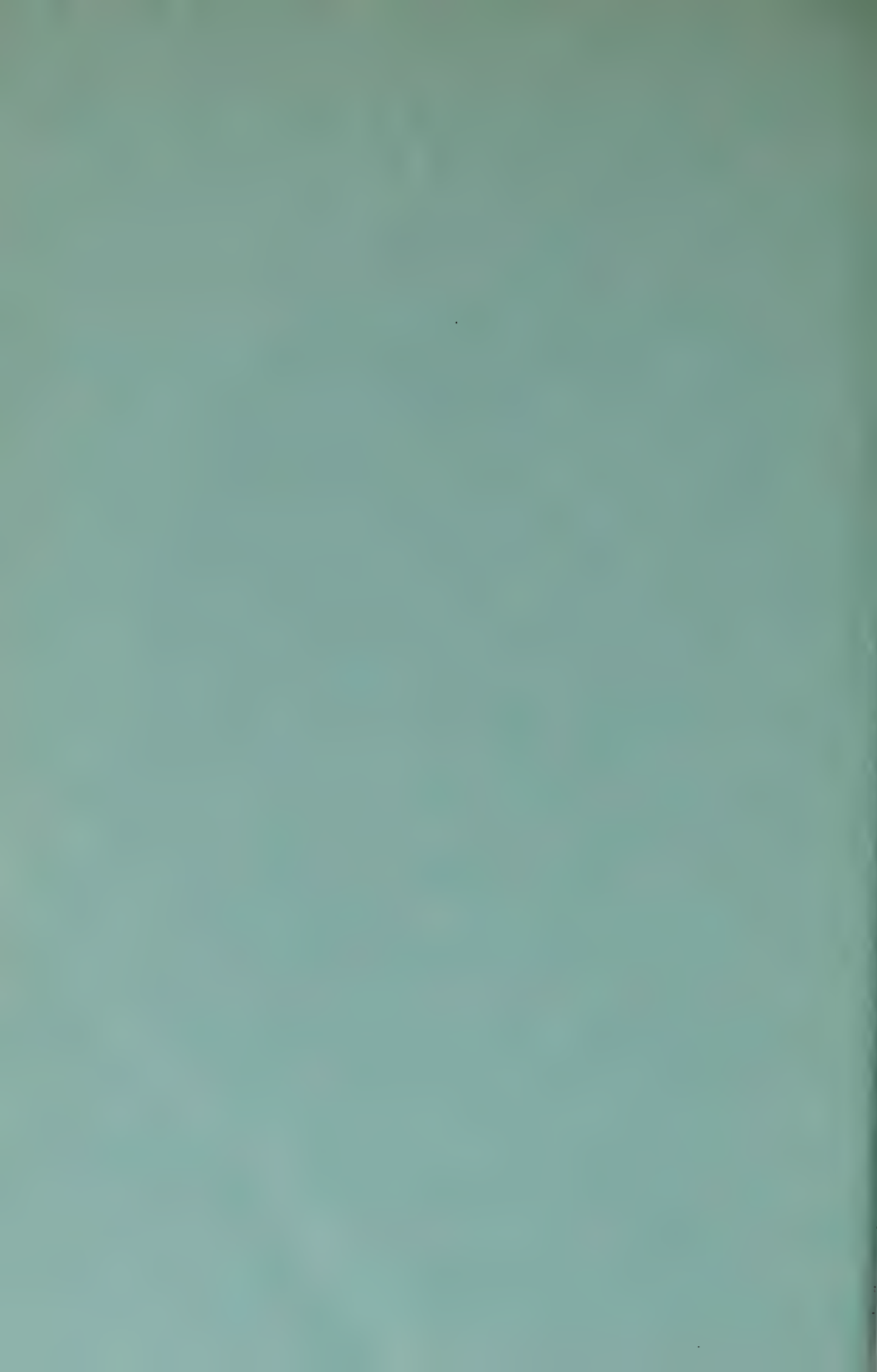
Upon Appeal From the United States District Court  
for the Southern District of California  
Southern Division

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ALLEN, ALLEN & EAGAN,  
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*Attorneys for Appellant.*

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FILED



United States  
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H. W. SWENDER,

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vs.

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*Appellee.*

NO. 4113.

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Appellant's Petition For Re-Hearing

TO THE HONORABLE, THE JUSTICES OF THE  
UNITED STATES CIRCUIT COURT OF AP-  
PEALS FOR THE NINTH CIRCUIT:

The closing admonition in one of the beautiful lec-  
tures of a certain fraternal order is this—"And de-  
spair not of the final triumph of truth."

The Objecting Creditor and his counsel have taken  
this admonition to heart, and we shall not despair  
of the final triumph of truth. It has been admitted  
on all sides that the testimony given by the bank-  
rupt in this case is untrue. There is no controversy  
on that point.

The evidence does not admit of any controversy on that point. But thus far the bankrupt has been able to evade the consequences of his untruthful testimony because as the Referee put it "he was not convinced that the bankrupt remembered the details of the transaction relating to the musical instruments and the due bills given in exchange therefor." In other words the bankrupt has avoided the consequences of his untruthful testimony by means of the old worn-out excuse "I don't remember."

Neither this Court, nor the Referee who heard the evidence, nor can anyone else prove with geometric certainty that the bankrupt testified untruthfully intentionally or unintentionally. Absolute demonstration of the bankrupt's intent in giving the untruthful testimony is out of the question. But in determining what *was* the intent of the bankrupt in testifying untruthfully, this case like all other cases must be measured not by a variable standard which might be varied in each case to suit the notion of the trier of fact, but instead it must be measured by the fixed standard of what the ordinary man in the circumstances would have remembered.

And this Honorable Court is undoubtedly more competent to pass upon that question than any single judge. In the absence of any proof that the bankrupt was a grossly ignorant man or was to some degree a mentally incompetent person, his acts and conducts must be measured and judged by a fixed standard—namely, that of what the ordinary man in like circumstances would have remembered.

The Referee in the case at bar applied a different standard, namely, his own individual judgment as to whether the bankrupt has testified untruthfully. This individual judgment was based according to the Referee's own admission, upon the impression made upon the Referee by the bankrupt's demeanor upon the stand and because the witness appeared frank and candid and seemed to be a willing witness and because he created a favorable impression on the Referee. Just how it could be possible for the witness to create a favorable impression upon the Referee when in the Referee's own words the bankrupt "seemed not to realize or appreciate the solemnity of the proceedings or the importance of the truth concerning the transaction's relation to the musical instruments," will always remain a mystery; but be that as it may, it appears without any doubt from the Referee's report that he recommended the discharge of the bankrupt notwithstanding the untruthful testimony the bankrupt had given because in this particular instance the frank, candid, willing appearance of the bankrupt led the Referee to believe that the untruthful testimony had not been given intentionally. Now, if the Referee could lawfully draw his own deductions in each particular case as to whether the bankrupt had testified untruthfully intentionally or unintentionally, there could never be any uniformity in the administration of the Bankruptcy Act, and furthermore such a rule would tend to open the door to an abuse of discretion from which an appeal would lie in name only. Therefore we say that for the sake of uniformity in the ad-

ministration of the Bankruptcy Act, that where a bankrupt has testified untruthfully, the question of whether he did so intentionally or unintentionally is not a matter of fact to be determined in each particular case, according to the impression made upon the trial judge, but instead is a matter of law which must and will be determined by applying the standard of what the ordinary man in like circumstances would have remembered.

But this is an entirely different situation than that presented where the trier of fact is the judge of the credibility of the witness in the first instance. This is a situation where it is an established and recognized fact that the witness did not tell the truth and the question presented is: Did the witness tell what was not true intentionally or unintentionally. It is in such a situation that the rule applies that the trial judge is not at liberty to decide the question as a question of fact according to his personal and individual impressions of the witness which he used in the first instance before the bankrupt's testimony had been proved untruthful, but that on the other hand he must judge the explanation offered by the bankrupt for the false testimony, to-wit, forgetfulness, by determining what the ordinary man in like circumstances would have remembered. It is no longer a question of credibility of the witness; it is now a question of mixed fact and law as to what the ordinary man would have remembered in like circumstances.

When this correct rule is applied to the findings which the Referee has himself made in this case,



it will be seen at a glance that the Referee erred in recommending the bankrupt's discharge, for the Referee says in his own words that "judged by the usual experience in human affairs and in the course of ordinary memory, it would seem that Empie should have remembered more promptly and more clearly the circumstances relating to his disposition of the piano and phonograph—it would seem that ordinarily he should have given the full facts on the first, as well as on the last occasion of his testimony in respect thereto." Having made these findings, it was clearly error on the part of the Referee to recommend the discharge. The situation is analogous to that where a judgment is inconsistent with and is unsupported by the findings. Furthermore this Honorable Court is fully as competent, to judge as was the Referee as to whether the ordinary man in like circumstances would have remembered that he had not sold his one and only grand piano and his one and only Victrola to some *unknown stranger* for *cash* when at the very moment of so testifying he had the proceeds of the sale in his pocket in the form of due-bills payable in merchandise only, which due-bills had been given to him in payment for his piano and Victrola not by a stranger but by the Southern California Music Company of Los Angeles, the very same company from which the bankrupt had purchased the piano and Victrola a few months before. We say that this Court is as competent as the Referee to judge as to whether the ordinary man in like circumstances who gave such testimony gave it intentionally or unintention-

ally. The law permits but one conclusion to be drawn from the giving of untruthful testimony where it is given under such circumstances that the person giving it could not help but know and should be held to know that it was false; and that conclusion is that it was untruthful through intention.

The bankrupt testified before the Referee at the first meeting of creditors that in the fall of 1919 he had purchased from the Southern California Music Company, of Los Angeles, a grand piano for \$850.00 and a Victrola for about \$300.00, and that in June of 1921 he had sold his grand piano and Victrola for cash and mingled the proceeds with his general funds and spent them, and that the purchaser was a stranger to him, whose name and address he did not know, and that the purchaser came to the bankrupt's house with a truck, and that he did not know how he happened to find the purchaser, but that he had advertised the piano and Victrola for sale at the time, but that he did not remember whether the purchaser came in answer to the advertisement or not, and that he (the bankrupt) had only a hazy recollection of the transaction and that he had not thought of the thing in years.

Here was indeed a tantalizing situation. The creditors felt and knew intuitively that the bankrupt was not telling the truth, but they had no way of proving it. There was hardly a clue for the creditors to start from in solving the question of what had become of the piano and Victrola. But in the first place, the creditors knew that it had not been "years" since the bankrupt had thought about his

piano and Victrola, for the evidence showed that the bankrupt had the piano and Victrola in his home up to and including the 1st day of June, 1921. And the first meeting of creditors was on July 6, 1922. So that much was certain—it had not been *years* since the bankrupt had thought of the sale of his piano and Victrola. It had only been one year, one month, and six days since his one and only grand piano and his one and only Victrola had been sold. An examination of the records of the two banks with which the bankrupt had testified he was doing business, to-wit, the Security Trust & Savings Bank and the Hellman Commercial Trust & Savings Bank, quickly established the fact that there were no deposits in the bankrupt's account in either bank which in any way approximated the amount which the bankrupt testified that he received for his grand piano and Victrola. The bankrupt's testimony on the question of the amount he had received for his piano and Victrola should have given his creditors a clue, but it did not. The bankrupt was asked: "Did you sell it (the piano) for cash?" The answer was: "I—yes." The next question was "How much?" The answer was: "Well, there was—just turned over the amount of money, \$850.00." When asked what he had received for the Victrola, he said: "About \$300.00."

This seemingly was the end of the trail. It was a most discouraging outlook for the creditors. While the bankrupt's protestations of forgetfulness of the transaction were unbelievable, nevertheless, the creditors had no proof to show that the story was false.

But we did not despair of the final triumph of truth. We set to work to find out what became of that grand piano and Victrola. It took four months of painstaking, heartbreaking, and expensive detective work to find out something that the bankrupt should have frankly told his creditors in four seconds, and that was this: The bankrupt had sold his grand piano and Victrola to the Southern California Music Company—the very same company from which he had bought them! And the payment he had received for his piano and Victrola instead of being cash which he had deposited with his general funds and spent, as he had testified, was received in the form of two due bills! These due-bills were payable only in merchandise. One of the due-bills was for \$850.00, and was in payment for the piano. The other due-bill was for \$312.50 and was in payment for the Victrola.

But an even more astounding revelation was the fact that the bankrupt at the very instant of testifying before the Referee at the first meeting of creditors when he had testified that he had sold his grand piano and Victrola for cash to some stranger whose name and address he did not know, and had mingled the proceeds with his regular business funds, and that he did not know whether the stranger who purchased the piano and Victrola came in answer to his advertisements or not and that he had only a hazy recollection of the transaction and that he had not thought of the thing in years—an even more astounding revelation we say was the fact that at the very instant of so testifying the bankrupt had in his



possession the two due-bills which he had received from the Southern California Music Company in payment for his piano and Victrola; and six weeks after giving this perjurous testimony the bankrupt sold one of the due-bills to a chance acquaintance whom he happened to meet in the street car on the way to his home.

How in the name of common sense could any sensible human being believe that the bankrupt actually forgot that he had not received cash for his piano and phonograph, when at the very instant of so testifying he had the proceeds of the sale in his possession in the form of due-bills, which were payable only in merchandise.

What a base slander upon the human faculty of memory to say that Empie was not deliberately falsifying when he testified that he did not remember the transaction very well and that he had only a hazy recollection of the transaction and that he had not thought of the thing in years—when right at that very moment of uttering that false testimony the bankrupt had in his possession the proceeds of the sale in the form of due-bills payable in merchandise.

What a reflection it is upon human intelligence to say that it was possible for Empie to have honest and truthful intentions in testifying that he had sold to some stranger for cash, which cash he had mingled with his general funds and spent, when at the very instant of uttering the words he knew that the “stranger” was the Southern California Music Company—the very same company from whom he had purchased the piano and Victrola; when he knew



that he had not sold for cash and deposited the money with his general funds for the simple reason that at that very instant he had the proceeds of the sale in his possession in the form of due-bills payable in merchandise.

No doubt this Honorable Court wonders why black has thus been called white. We cannot explain without going outside of the record, and we will not do that without being invited to do so by the Court, notwithstanding the fact that an injustice was done the Objecting Creditor which will be irreparable should the bankrupt's discharge be granted. But black has been called white just the same; and the question now before this Honorable Court is: Will the finding of the Referee that the bankrupt did not remember the truth stand in the face of the overwhelming presumption of the human impossibility of such complete forgetfulness by the bankrupt of vital, outstanding, present facts. It is an abuse of discretion on the part of the Referee to say that Empie could possibly have forgotten the truth concerning those things of which he testified falsely; such a holding by the Referee is flying directly in the face of human experience with the ability of man to recall the past and recognize the present. If a Referee can excuse such palpably intentional false testimony on the ground of forgetfulness, then hereafter a finding of "false oath" will be entirely dependent upon the notion of the trier of fact as to the credit that should be given to the excuse offered by the bankrupt and will no longer be measured and be determined by the law.

We say that in such a case as this one, where the bankrupt has testified untruthfully about vital, important, and outstanding facts then within his knowledge, and concerning which forgetfulness is incredible and humanly impossible,—that in such a case it is no longer a question of fact as to whether the bankrupt testified truthfully intentionally or not, and it is no longer a question which the Referee in the case at bar was at liberty to resolve either way, according to his impressions, but instead it is solely and purely a question of law from which, in this case at least, but the one conclusion can be drawn, namely, that the bankrupt testified falsely intentionally.

The Bankruptcy Act has provided a penalty for the offense of False Oath,—the denial of the discharge. The Act is not to be set at naught by a finding that the false oath was uttered through forgetfulness when it is contrary to all human experience to believe that forgetfulness is humanly possible concerning the present vital facts of which the evidence shows the bankrupt to have been admittedly possessed.

We shall not despair of the final triumph of truth. For the sake of uniformity in the administration of the Bankruptcy Act we ask that a “false oath” be dealt with as a “false oath,” and not be granted absolute in the name of forgetfulness. Black is not white!

We can see in the opinion recently rendered by this Honorable Court in this case unmistakable evidence of the grave doubts that were personally en-

tertaind by its members as to the bankrupt's sincerity in his testimony. These personal misgivings, however, we believe were suppressed out of deference to the trier of fact. We have endeavored to point out that where a bankrupt testified untruthfully the question of whether he did so intentionally or unintentionally is not a matter of fact to be determined in each particular case according to the personal and individual impressions of the trial judge; but that on the other hand the true rule is that where a bankrupt testified untruthfully he will be deemed by law to have done so intentionally if the ordinary man in like circumstances would have remembered the truth. Any other rule, and particularly the rule applied by the trier of fact in the case at bar, would be productive of anything but uniformity in the administration of the Act.

We therefore invite the attention of the Court to this point, which has not heretofore been squarely presented, and we earnestly request a rehearing.

Respectfully submitted,

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